No. 588 Brief

Brf. of Harrison & Worthington for Respondents

Office Supreme Court U. S.
FILED
SEP 30 1900
JAMES H. MCKENNEY,
CLERK.

588

Filed Sept. 30, 1900.

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

MICHAEL W. O'BRIEN ET AL.,
Executors, etc.,
*Petitioners,*
*vs.*
JOHN G. WHEELOCK ET AL.,
*Respondents.*

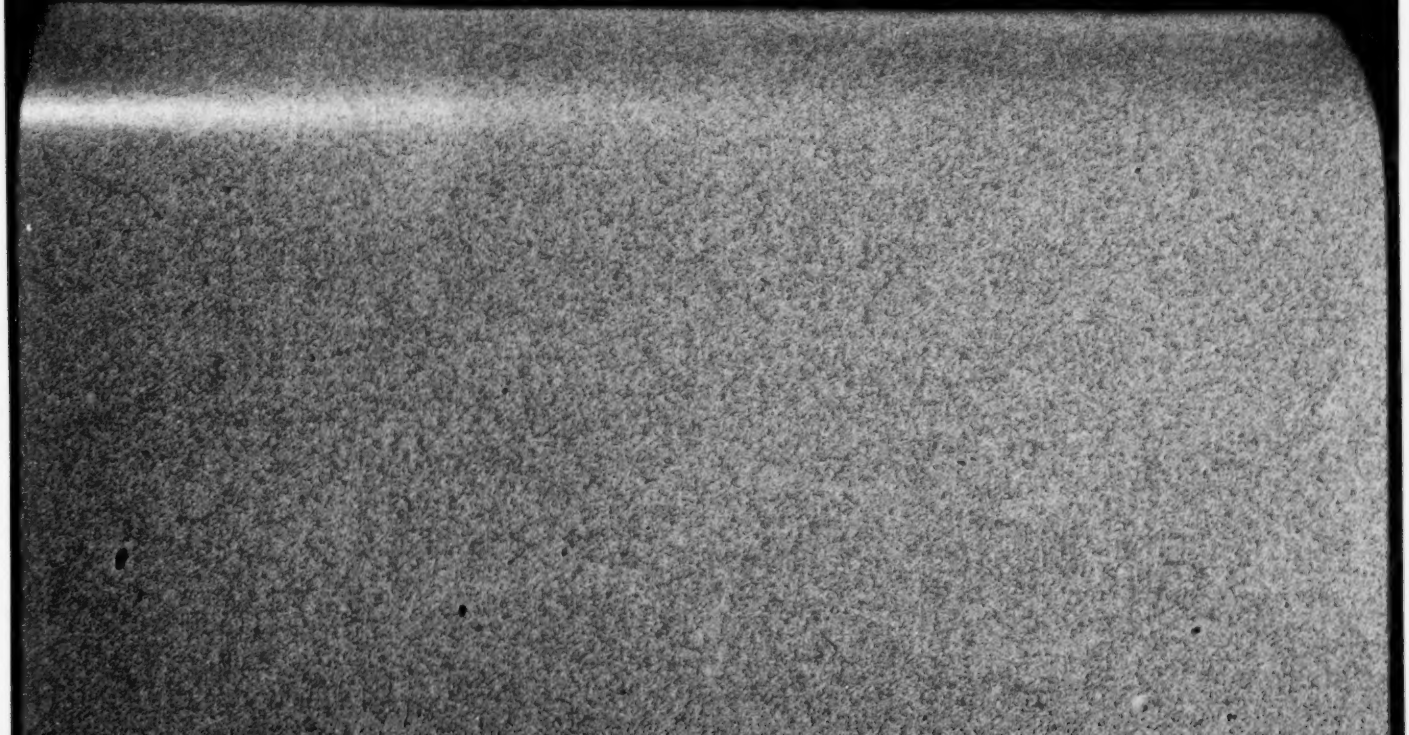
PETITION FOR WRIT OF CERTIORARI.

## Brief for Respondents in Opposition to Petition for Writ of Certiorari.

BENJAMIN HARRISON,
THOS. WORTHINGTON,
*Counsel for Respondents.*

ASA C. MATTHEWS,
HARRY HIGBEE,
ALBERT G. CRAWFORD,
*Of Counsel.*

C. G. Burgoyne, Walker and Centre Streets, N. Y.



# In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

| | |
|---|---|
| MICHAEL W. O'BRIEN ET AL., Executors, etc., Petitioners, vs. JOHN G. WHEELOCK ET AL, Respondents. | Petition for Writ of *Certiorari*. |

## Brief for Respondents in Opposition to Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

Respondents desire to avail themselves of the privilege granted by the rules of this Court to reply, as briefly as may be, to the petition for a Writ of *Certiorari* filed in this cause.

The statement of facts submitted by counsel for petitioners is so brief, and omits so many matters which counsel for respondents consider material, that it is necessary to make a separate statement of some of the facts appearing in the record which appear to be material on this hearing.

### General Statement.

**I.** On April 24th, 1871, the General Assembly of the State of Illinois passed an Act entitled "An Act to provide for the construction and protection of drains, levees and other works."

We will not undertake here to detail the provisions of this Act, but refer the Court to it as found in the record (R., pp. 394–404; Laws of Illinois of 1871–2, pp. 356–365). It is only necessary to say that the general scheme of the law was the construction and *maintenance* of a levee by special and rateable compulsory assessments upon the lands benefited (See, especially, Sec. 39, R., p. 403, as quoted on page 5 of the Petition for Writ of *Certiorari*). Under this Act there was organized what purported to be a drainage district known as the Sny Island Levee District, embracing about 110,000 acres of land on the east side of the Mississippi River in the counties of Pike, Adams and Calhoun, in Illinois. The purpose of the organization, as stated in the petition filed by certain land owners in the County Court of Pike County, was "for the purpose of constructing a levee," and of "*repairing, enlarging, protecting and maintaining* said proposed levee" (R., p 445). This levee, as shown in the proceedings, is about 52 miles in length, and was to be constructed, *repaired and maintained* to protect the lands in the district from overflow by the waters of the Mississippi River. No other purpose is stated in the proceedings in said County Court.

**II.** In accordance with the order of said county court, the commissioners of the district issued in 1872 certain so-called bonds, signed by the commissioners in their official capacity, to the amount of about $500,000. A contract was entered into with certain contractors for the construction of the levee, and under said contract the contractors were to accept the bonds of the district in payment for their work, at the rate of 90 cents on the face value of the bonds (R., p. 366 & p. 80), *after* each section was constructed. The record shows that the bonds were so delivered to these contractors and by them disposed of. A certain number of them, amounting to $202,-

000 became the property of Mr. Francis Palms, the original complainant in the cause to which it is sought to connect the present action.

In 1875 other bonds to the amount of $148,500 were issued, and they were all taken by the contractors who constructed the levee, and subsequently became the property of Mr. Palms.

**III.** In 1872 an assessment was made, under the orders of the said county court of Pike County, upon the several tracts of land in the district, purporting to represent the estimated benefits conferred upon the several tracts from the construction and maintenance of said levee; and the first issue of bonds was based upon this assessment.

A similar assessment was made in 1875, and bonds to the amount of $148,500 issued thereon and likewise delivered to the contractors.

**IV.** The commissioners of the district pursued the regular course marked out by the Act of 1871 to secure payment of said assessments, applying in 1873 to the county court of Pike County for judgment against those tracts upon which assessments had not been paid. Certain of the owners of lands in the district resisted payment, more especially those in the lower part of it, who at all times had consistently maintained that their lands would not be benefited by the proposed work, owing to the fact, as claimed by them, that the waters of the Mississippi River came in around the lower end of the levee and inundated their lands by backwater to almost the same extent as though the river flowed directly across them. These land owners, including one Webster, filed objections to the rendition of judgment against their lands for said assess-

ments, and the matter was contested in the county court of Pike County where judgment was rendered against the lands. From the judgment of that court the case was appealed to the Circuit Court of the county, where the judgment of the County Court was affirmed, and thence appealed to the Supreme Court of the State of Illinois, where the title of the case was Webster *et al.* vs. The People. The commissioners of the district and the land owners generally sought to enforce the assessments by every means known to the law, and, as stated by the bill filed in this cause, when an adverse decision had been rendered even sought a rehearing; but the Supreme Court decided in favor of Webster and other parties resisting the assessments. Another cause was pending in the Supreme Court at the same time, arising under the same law and involving the same questions, which is known as Updike vs. Wright, reported in 81 Ill., 49. In this cause the court rendered an opinion which held in substance as follows:

1st. That the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the provisions of the Statute of April 24, 1871, and said proceeding is therefore without authority of enabling law.

2nd. That Article 4, Section 31, of the Constitution of 1870, which is as follows: "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches for agricultural or sanitary purposes across the lands of others," does not authorize the construction of a levee independent of drainage.

3rd. That Section 9, Article 9, of the Constitution of 1870, authorizing the General Assembly to vest the corporate authority of cities, towns and villages, with the power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, is a limitation of the power of the Legislature, and the General Assembly can vest such power to

make local improvements by special assessments or special taxation *only* upon the municipal authorities therein named, and had no power to confer such authority upon any other bodies, and conferred no power upon the drainage commissioners in said cause; and that therefore said assessments and bonds are void.

4TH. That the burden of taxation or special assessments cannot be imposed upon a locality without the consent of the taxpayers to be affected. The owners of such lands must have the right of election in such matters.

No opinion was rendered by the Supreme Court of Illinois in the Webster case; but in the order of the Court it is stated that the decision is based upon the questions raised and discussed in the Updike case, and "that for the reasons there given, the judgment in this cause will be reversed," etc., (R., p. 459). These cases were decided at the January Term of the Supreme Court of Illinois, 1876.

**V.** It is clearly established by the evidence that the original levee was never protective, was a mere trap, and that it broke and was in many places washed away during the first high water to which it was subjected (R., pp. 91, 115, 116, 227–236, 227, 228, 238–242, 131, 313, etc.

Under the stimulus of the Act of 1871, and the hope of ultimate reclamation of the lands, their selling price had materially advanced until the decision of the Supreme Court in the Updike and Webster cases, and the numerous breaks in the levee which occurred in 1876. In the period from the beginning of the construction of the levee in the winter of 1872-3 until 1876, great changes had occurred within the district. Farms had been opened up, houses built, fences constructed, and a hardworking and industrious people were rapidly filling the region with American homes and all that

they imply. About the 14th day of May, 1876, the levee broke in many places and the Mississippi River poured in a resistless flood over all the lands in the district—the lands which the levee was intended to protect. When the floods came, houses, outbuildings and fences were washed away; crops were destroyed, stock was drowned, people were rendered homeless and gathered in tents upon the adjacent hills. The supposed benefits to the lands at once disappeared, and they returned practically to the same condition that existed before the scheme of protection was undertaken. **The losses of the land owners greatly exceeded the value of the land, and were many times greater than the cost of the levee.** See tes. of Hon. Scott Wike, R., pp. 335–7; of Hon. A. C. Matthews, p. 332–3, and others, p. 119–121, 154, 169, 171, 183, 163, 150, 146, 205, 164, 157, 158, 116, 246, 261, 313, 295, 146, 141, etc.

**VI.** The decision of the Supreme Court of Illinois in the Webster case was known to all of the people in the district, the case having been appealed from the county in which the greater part of the lands in the district lie. The people believed, and had a right to believe, that the law under which the enterprise had been undertaken had been completely overturned, and that no means remained under the law of repairing the levee or of retrieving their misfortunes. They relied upon the decision in that case as a rule of law and property governing their interests in the district (R., pp. 338, 334, 292, 340, 293, 294, etc.).

**VII.** In this state of affairs, the people, finding themselves without any authority of law for the repair and maintenance of the levee, by a system of special compulsory assessments

or otherwise, and having in many instances their entirely earthly possessions embarked in the enterprise, some of them contributed money and voluntary labor toward repairing the breaks in the levee, and about one-third of the lands in the district were put into a trust deed from which it was proposed to raise about $30,000 for the repair of the levee. This was a merely temporary and ineffective matter, which they hoped might protect them until some more permanent means of relief could be obtained.

In 1878, through the instrumentality of some of the owners of land in this district, and of others in various parts of the State similarly situated, an amendment to the constitution of Illinois was submitted to a vote of the people and adopted in that year, giving to the General Assembly of Illinois the power to pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary and mining purposes across the lands of others and to provide for the organization of drainage districts, etc. (1 S. & C., Ill. Stat., p. 122).

On May 29, 1879, the Legislature of Illinois, under the above constitutional provision, passed an Act, entitled "An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." (1 S. & C. Ill. Stat., p. 919). Under this Act a drainage district was organized in 1880 with power to levy special assessments to build or repair a levee. This district embraced about 90,000 acres of land, which had been a part of the original Sny Levee District, which comprised 110,000 acres. This organization levied assessments from time to time upon the lands in the district, which most of the landowners paid, and at the time when the testimony in this case was taken in 1893 about $500,000 had been collected since 1876 from voluntary contributions and special assessments, and expended in relocating, repairing and

building the levee (R., P. 224–5). The new levee was located in general on the line of the former one; but there are between three and four miles of the present structure having an entirely different location from the old one. The United States Government purchased certain right of way for the new levee, and expended large sums in its construction and repair (R., p. 224–5), and for this purpose appropriated considerable sums from time to time. Moreover, three railroads whose embankments are in part used by the drainage district furnish about three miles of the levee system (R., p. 77 and 224).

**VIII.** On the 4th day of May, 1878, Francis Palms, of Detroit, Mich., as the owner of certain bonds of the district (certain other holders of bonds joining with him) filed a bill in the United States Circuit Court for the Southern District of Illinois against Wheelock, Jones and Westlake in their official capacity as commissioners of the old Sny Levee District (R., p. 9). The bill sought through these commissioners to enforce and collect the original assessments of 1872 and 1875 *as such*. Not one of the land owners was made a defendant. On March 13, 1879, the court referred the cause to a Master to take evidence as to the "*principal* and interest on account of such loans," etc., and ordered that, after the coming in of the Master's report as to the amounts found due, "the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all of the present or future owners of said lands alleged in said bill to be benefited by said levee and other works," etc., * * * "and the said complainants are at liberty to use the names of the defendants [the old levee commissioners] in any such proceedings by way of supplemental bill, if they are advised that it is necessary to do so," etc. (R., pp. 437-8).

The Master's report of July 7th, 1880, as stated in the order of that date, finds the total amount of interest due and

unpaid to all the parties then complainants in the case to be $304,908.26, and the amount of interest then due to the complainant Palms $221,228.26, and the privilege, granted in the former order, was repeated, that the "complainants have the right and liberty to proceed in this Court in the name of said defendants as complainants, as such commissioners, or in their own name as complainants, against the lands described in said Exhibit 'A,' and the owners thereof," etc. (R., pp. 439-441).

Meanwhile, the levee had again broken in the month of June, 1880, before the work under the new organization was undertaken, and again it gave way in the spring and fall of 1881, before the new levee was completed, sweeping away all crops and many fences and buildings (R., pp. 116-119, 221-223). Mr. Palms did not then avail himself of the permission granted him by Judge Drummond to file a bil against the land owners, and did nothing more in the case during his lifetime. His death occurred November 20th, 1886, and he attended to his own business entirely up to the day of his death ((R., p. 373).

The levee again broke in 1888, and crops and houses were again swept away (R., pp. 119-116, 121-123). And still the representatives of Mr. Palms did nothing toward asserting their rights against the lands in the district until after the land owners had imposed upon themselves the burden of an additional assessment of $100,000 for the further repair of the levee (R., p. ).

It was not until April 22, 1889, that the present bill was filed by the representatives of Mr. Palms against the owners of, or parties interested in, the several tracts of land in the district, having waited until the land owners had expended at least $450,000 in the repair of the levee. A hearing was reached in the Circuit Court on November 8, 1895, and a decree was entered dismissing the bill on February 10, 1897 (R., p. 474). From this decree complainants prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh

Circuit, where the cause was heard June 7th and 8th, 1898, before Mr. Justice HARLAN, of this Court, and Circuit Judges WOODS and SHOWALTER. The opinion in the cause was delivered by Mr. Justice HARLAN, and on the 6th day of June, 1899 (after the death of Judge SHOWALTER), an order was entered affirming the decree of the lower court. A petition for rehearing was presented by complainants and overruled on the day of February, 1900, no opinion having been filed at that time.

## IX. The laches of complainants and of Frances Palms.

The first and all-sufficient reason which we urge against the granting of the writ of *certiorari* in this cause is, that complainants are clearly barred of any equitable relief both on account of their own laches and the laches of Mr. Palms, whom they represent. As the Court will see from the above statement the litigation in regard to these assessments has been in progress since the organization of the district in 1872—28 YEARS—and that concerning the very bonds now in controversy has continued in some of its forms since May 4, 1878. Mr. Palms had notice of the very beginning of the litigation opposing the collection of assessments, for it appears from the evidence of complainant O'Brien that Mr. Palms sent one John Atkinson, an attorney of Detroit, Mich., to Illinois to investigate as to the validity of the bonds in question, which he contemplated purchasing from the contractors (R., p. 371); and the opinion of Col. Atkinson, so obtained by him (but addressed to John Heffron, Esq., one of the bondsmen for the contractors), showed that: "July 22, 1871 [1872], the commissioners filed the assessment roll, and ask for its confirmation. Two appeals were taken, as appears by the files, *and are undetermined*" (R., p. 457). It would

therefore seem highly inequitable that defendants should be further harassed with this litigation. We insist that this record shows petitioners are clearly barred. The petition seeks to excuse the delay of Mr. Palms and complainants in availing themselves of the privilege granted by Judge DRUMMOND in 1879, of filing a supplemental bill and bringing the land owners into court, by insisting that a large part of the bonds were not then due. A quite sufficient answer to this contention is that Mr. Palms and his eminent counsel certainly considered that he was entitled to equitable relief when he filed his original bill in 1878. If Mr. Palms might have delayed the bringing of any action until the principal of his bonds matured, *he did not do so.* His interest to the amount of some $221,000 was due, and he elected to bring an action. In doing so he came under a duty to prosecute with diligence. In that bill he asked for "an accounting for the *moneys advanced* by complainant to said Commissioners as aforesaid and interest thereon" (R., pp. 13, 427); and made the following a part of his prayer: "And when the amount due to your orator for *principal and interest* as aforesaid is well ascertained, may it please Your Honors to order and declare that your orator is entitled to a lien upon the said level," etc. (R., p. 428). In the decretal order of March 13, 1879, leave was given "the complainants * * * to go before the Master and produce their said bonds and coupons and interest thereon, and make proof of the amount due them of *principal and interest* on account of such loan," etc. (R., p. 437).

The petition undertakes to give another reason for the long delay, which is as follows: "*In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners were expending money in repairing*, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due" (R., pp. 45-6). Here we find the real reason for this long delay. Mr. Palms *knew* that "there

were extensive breaks in the levee in 1880, followed by more in 1881;" he knew that the "land owners were spending money in repairing" these breaks; he knew, as averred in his bill, that these lands were not worth to exceed fifty cents an acre (or a total of about $50,000) and were wholly inadequate security for his bonds, unless a good and sufficient levee were constructed (R, p. 42).

The question has been treated as one of laches. But the fact is it was not laches but a deliberate lying by until the unwary land owners should have, by a new and valid proceeding and by new assessments upon their lands, made the complainants' security good. The petition has with most admirable frankness told us, as above cited, the cause for this long delay, which was not oversight nor neglect. The admission is that the filing of the bill was *purposely* delayed until the land owners should by fresh contribution have restored the levee, and so make good the complainants' security.

If we turn now to page 2 of the petition, we find this: "It has remained unbroken since 1888, and has grown as solid and secure as a natural embankment." The present complainants might have proceeded soon after the death of Mr. Palms in 1886, but they waited until after the break in the levee of 1888, and until the land owners had imposed the burden of an additional assessment of $100,000 upon their lands to repair those breaks, which would further tend to enhance the value of their securities, if they should be held valid. These expenditures would doubtless never have been made if Mr. Palms had filed his supplemental bill when he had permission to do so. It is not a case of a sleepy eye, either on the part of Mr. Palms or the present complainants, but of watchfulness for an advantage. If there were no other reason the petition should be denied. These defendants have a right to think that the finality of the judgment of the Circuit Court of Appeals should be recognized.

In so far as this suit affects the original commissioners made parties defendant in 1878, it is barred by laches in failing diligently to prosecute a suit already instituted, as in Johnson vs. Standard Mining Co., 148 U. S., 370. In so far as all the other present defendants are concerned it is barred by failure to *institute* a suit, for no suit was instituted against the land owners until April 22d, 1889.

The cases upon this subject are collected in Galligher vs, Cadwell, 145 U. S., pp. 372–3, from which it appears that this Court has frequently denied relief on the ground of laches for delay varying from two to seven years.

It is true that Mr. Justice HARLAN did not base his opinion in the case at bar directly upon the ground of laches; but he says: "He [Mr. Palms] was given leave to file a bill by an order entered in 1879, but he died in 1886 without availing himself of the privilege so given, although a large amount of interest was then due, and although almost $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land-owners that the Court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate because it is provided by Statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the decree which becomes a lien, except upon the renewal of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' adverse possession under color of title and payment of taxes, or as to unoccupied land by seven years' payment of taxes under color of title (See S. & C. Ill. Stat., C. 77; Sec. 6; C. 83, Secs. 4, 6 & 7, pp. 1386, 1538, 1547," etc.).

Counsel in his brief says (p. 46) : " During the period between the decree of 1880 and the filing of the bill no such changes in the title of the lands have occurred that defendants will suffer great injury if assessments are now enforced" * * * " They did so at their peril. The acts of estoppel are almost all proven by matters of record." As a matter of fact, a very large part of the lands in the district have changed hands in that period, and counsel seeks to bind all of them by notice of the original suit in this case " as a matter of record." We have seen, as stated by Mr. Justice HARLAN, that by the Statute of Illinois no such " notice by matter of record " existed in this case at the time the present bill of revivor, or supplemental bill, was filed. But the present bill tells us that a number of the present defendants " acquired portions of said lands from those who owned them at the time the first levee district was formed " (R., p. ).

It will clearly appear to the Court from the record in this case, and perhaps sufficiently from the citations above made, that the enterprise was of a hazardous nature, both to the owners of lands and the parties who purchased bonds of the contractors having charge of the construction of the levee. Mr. Palms not only obtained a concession of ten per cent. from the face of the bonds, in making his purchase, but was to receive ten per cent. interest upon their full face value, and he sent his attorney to Illinois to investigate whether he could take the chances even on these very liberal terms. On the part of the landowners the enterprise had also its hazards. It is said by this Court in Johnson vs. Standard Mining Co., 148 U. S., 370, in substance, that courts look with disfavor upon claims of those who have lain idle while waiting the development of property by the courage and energy, and at the expense of others; and in that case relief was denied to the complainant after a delay of about two years. This principle appeals with striking force to the claim of complainants. Mr. Palms knew the risks of the enterprise, and the struggle that

was going on to reclaim these lands, and having rested upon his rights with such knowledge for the period of about nine years, we earnestly insist that not only the provisions of positive law, but that every consideration of justice and equity, demand that he or his representatives should not now be permitted to enforce his claims against those by whose energy, courage and expenditure the lands have attained whatever value they now possess.

Moreover, the conduct of Mr. Palms was such as to induce any owners of lands in the district who knew of his claims to believe that they had been abandoned, and lands were bought and sold by many persons with such belief (R., p. ).

In the opinion of the Circuit Court of Appeals, Mr. Justice HARLAN uses the following language: "The proof makes it quite clear that the levee work done under the Act of 1871 would have been substantially without value for the protection of the land owners, but for what they did out of their own means after the break in 1876, and what was done under the new organization which came into existence under the Constitutional amendment of 1878 and the Act of 1879" (p. 32 of Original Opinion).

Practically all the value the lands now have is due to the expenditures of the land owners since 1876. The representatives of Mr. Palms should not be permitted to reap the *only* benefit to be derived from such expenditures. For the total issue of bonds was but a little under $650,000; and the total interest thereon to date would be, approximately, $2,300,000. The bill alleges that the lands when protected by a good levee were worth an average of $25 per acre, or an aggregate for the 90,000 acres in the present drainage district of $2,250,000. The total assessments upon any tract of 160 acres, as shown by Appendix "A" to the petition, is $1,132.80. By the act of 1871 they were to bear 10% interest, and such interest unpaid to the present time would be, approximately, $2,900—a total of over $4,000, or $25 per acre. The record shows that the

lands in the district are not worth on an average the amount as stated by complainants (R., pp. 128–9, 132, 141, 146; but on their own showing they would reap the entire benefit from the protection of the lands if the assessments in question are declared valid liens upon the lands in the district.

We urge these considerations as to laches now because we think they are most appropriately to be considered on the hearing of this application to open the judgment of the Circuit Court of Appeals so as to subject the respondents to many further months of uncertainty and delay.

## X. Questions of "Gravity and Importance."

By Par. XLVI. of the Petition (p. 29) it is insisted that the decision of the Circuit Court of Appeals is erroneous, and that there are several questions involved in this litigation of gravity and importance and of general interest upon which the decision of the Circuit Court of Appeals is in conflict with the decision of this Honorable Court, and with numerous decisions of the Federal and State Courts.

Respondents insist that no questions of "Gravity and General Importance" are presented in this cause; and we shall now consider some of the subjects presented by the petition under this head.

We are not acquainted with any statement by this court as to granting the writ of *certiorari* to Circuit Courts of Appeals which materially modifies its position, as stated in American Construction Company vs. Jacksonville Railway Company, 148 U. S., 372.

We see nothing in this case of such "peculiar gravity" as would cause this court to take jurisdiction. On page 47 of the Petition it is said: "The bill is filed *only* to enforce the lien of the *levee assessments*. The validity and amounts thereof are the only questions in the case. On page 2, Par. 4

of the Petition, it is said that "It is not a bill to enforce contributions to, or to collect proportionate amounts of, a *gross* sum, but simply a bill in the nature of a bill of foreclosure to enforce the liens of several and specific assessments," etc. It is, therefore, a case of no more "gravity," so far as the amount is concerned, than if there were a number of suits each involving the assessment upon a separate tract of land. We do not understand that, in any case, the amount involved has alone been sufficient to induce this court to take jurisdiction and grant the writ of *certiorari*, but that the writ has been refused in a number of cases in which the amount involved was greater than in this. There are no questions of "general interest" involved, and no such questions are pointed out in the Petition.

## XI. Basis for the decision of the Circuit Court of Appeals.

While the opinion of Mr. Justice HARLAN discusses several principles which might have constituted a sufficient defense, yet the decree of the Circuit Court is affirmed by the Circuit Court of Appeals upon four grounds: "First, the Act of 1871, was repugnant to the Constitution of Illinois of 1870. 2nd. The bonds issued under that Act were void. 3rd. The lands intended to be benefited and protected by the levee district under the Act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that Act. 4th. Nothing was done or said by the owners of the lands so intended to be benefitted and protected that estopped them to dispute the validity of the Act of 1871 and of all that was done under it, or that created any equity in favor of the holders of bonds to have said lands sold to pay any special assessment or the bonds issued to contractors." The first three of these propositions clearly involved only questions of law,

and we do not understand that the petition seeks to combat the position taken by the Circuit Court of Appeals upon those questions. The opinion filed by Mr. Justice HARLAN states the authorities bearing upon the question of the unconstitutionality of the Act of 1871 so fully, and his reasoning is so clear and forcible, that we do not consider it in the least necessary to argue that question, nor to refer to the authorities sustaining the opinion, further than they are cited therein. It is clearly made to appear that the principles in which the Supreme Court of Illinois acted in the Webster and Updike cases had been recognized as the law of Illinois *prior* to the issue of the bonds in question, and that this Court in several cases has distinctly recognized the same principles. We will leave that question without further discussion. It must be assumed that counsel for petitioners is satisfied with the ruling of the Circuit Court of Appeals upon these propositions of law.

## XII. The alleged estoppel of certain respondents.

The fourth proposition stated in the opinion of the Circuit Court of Appeals presents mixed questions of fact and law, and it is the finding upon these questions which counsel for petitioners seeks to combat. On pages 30-32 the Petition refers to several facts supposed to be established by the record, which it is insisted are sufficient, in whole or in part, to estop the respondents, or some of them, from denying the unconstitutionality of the Act of 1871. The Circuit Court of Appeals had before it all the authorities now cited by counsel for petitioners, together with all the facts as disclosed by the record, and it passed upon the questions now presented as questions of fact under the law of estoppel as recognized by the courts. In passing upon this question Mr. Justice HARLAN says: "But it is contended that even if the Act of 1871 be

held to be unconstitutional the plaintiffs are entitled to relief as against all the defendants who have received a valuable consideration through the Statute procured by their own consent, or subsequently sanctioned by them, and by which they derived an interest. Some authorities are cited which apparently give support to this view, but when carefully examined they do not, we think, apply to a case in which the *circumstances are so peculiar as those disclosed by the present record.*" The italics are our own. He then proceeds to discuss some of the facts disclosed by the record as follows: "All who had any connection with the passage of the Act of 1871, or who desired its passage, acted, as we may assume, in good faith and in the firm belief that its provisions were not inconsistent with the constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work or to those who like Palms, purchased the bonds after they were executed and delivered to the contractors. The land owners, the contractors and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the Legislature to do what it attempted to do, no one being misled by the assurances and representations of others. The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view or assumes to be of no consequence whatever, the fact borne on the face of the Act of 1871, that what the land owners operating under it had in view was not simply to have a levee district, but to have a sufficient levee which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things it cannot be supposed that any land owners would have become connected with the scheme embodied in the Act of 1871 unless the *maintenance* of the levee by competent legal authority was assured. It is, therefore, unjust to the land owners to say nothing more than

that they assented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to the scheme under which a levee was to be constructed and *maintained* under the authority of law, from time to time, and so as to accomplish the results contemplated by the Legislature. The system devised by the Act of 1871 is to be looked at in its entirety. We cannot put out of view the vital part of it, and hold the land-owners who acted in good faith and who gave no personal assurances or made any representations responsible for the results to others flowing from invalid legislation and the partial execution of the original plan. If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the Act of 1871 was valid, with equal truth it may be said that the land-owners would never have sought or desired such legislation except in the belief that the levee would be *maintained* by the same authority that constructed it" (pp. 30, 31 of Original Opinion; 37 C. C. A. Rep., p. 309); and again on page 35 it is said: "The bonds were issued without authority of law, and there was nothing in the acts or conduct of the defendants to estop them from alleging the invalidity of the Act of 1871, or which creates an equity in the bondholders to have the benefit of any special assessment made under said act."

The question whether, when an unconstitutional law has been fully executed—has served its whole purpose—the persons who have taken the full contemplated benefit to be derived under such law may set up the invalidity of the law to escape paying for the benefits received, is NOT IN THIS CASE.

The case is this: A law of Illinois was believed by the owners of overflowed lands to authorize the erection of a levee, to protect the lands from overflow, and for its repair and maintenance by ratable legal assessments upon the lands benefited.

Proceedings for the construction of a levee were inaugurated. The contractors who undertook the work, and the persons who purchased the levee bonds, believed, as did certain of the land owners who were favoring the proceedings, that the law authorized the prooceedings and was constitutional. There was no misleading, no fraud, no false representations, no concealment by any one; but an honest, common mistake as to the validity of the law.

In a suit brought by a resisting property owner, the Supreme Court of Illinois decided that the law did not authorize the building of the levee, or, if it did, was unconstitutional. The levee, badly built, went to pieces. By section 39 of the Act of 1871 the power was given "on the suggestion of the commissioner or *any owner or occupant* of land" to make a new assessment to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, protect or *maintain* any drain, ditch, levee or other work constructed thereunder. (R., p. 403).

The efforts of individual co-operation for repairs failed, as they always do. Improvements and crops to the value of hundreds of thousands of dollars were swept away by the flood. The lands became again practically worthless to their owners, and as a security not worth pursuit. The petitioners in their bill declare that without a levee they were worth only 50 cents per acre.

The lands were thrown back substantially to their original state. No benefit whatever was left with the land owners. Their faith in the law and in the levee cost them, in the loss of crops and improvements, many times the cost of the levee. A levee without the power to defend it was only a snare. The power of the Levee Commissioners to make contracts, to protect the levee, was lost, and the Mississippi flood laughs at subscription papers. No sane man would store so much as a rick of hay behind such a levee. The power to assess for defense and repair was of the essence of the law.

Without that power the law conferred no benefit, a
power failed.

The case is wholly different from the cases cited
petitioners. In them the benefit contemplated by the
been fully enjoyed.

There is no conflict of cases to be reconciled here
has never been held anywhere that an unconstituti
could be enforced against any one upon the so-called p
of estoppel, unless the law had been fully executed—u
party to be estopped had received all of the conte
benefits of the law.

There is nothing in this case which places the
Court of Appeals in conflict with the decision of this
the case of Daniels vs. Tierney, 102 U. S., 415.

## XIII. Daniels vs. Tierney.

As counsel attaches so much weight to the decisio
court in Daniels vs. Tierney, and cites an isolated
from the opinion rendered in that case, quoting from
son vs. Landrum, 5th of Bush., it seems necessary to ca
tion to it, as briefly as may be.

It appears that the Convention in the State of Vi
April 13, 1861, passed an ordinance entitled "An ordi
provide against the sacrifice of property and to suspe
ceedings in certain cases;" whereby, when a debtor
whom there was an execution in the hands of an office
bond and security for the payment of the debt when t
ation of the ordinance should cease, his property s
restored to him. A few days later the ordinance of s
was passed. Daniels, against whom an execution w
hands of an officer, took advantage of this act, gave a
der it and had his property restored to him. Suit w
mately brought upon this bond, and Daniels pleaded

constitutionality of the Convention under which the bond was issued, and, hence, the invalidity of the bond itself. Judgment having gone against him in the court below, the cause was brought to this Court on writ of error. The Justices being divided as to the question of whether the bond was good as a common-law liability, the decision was placed upon the ground that Daniels was estopped to deny his liability under the peculiar facts of that case. The distinctions of both fact and law between that case and the one at bar seem to be very clear. In the Daniels case the creditor was not to be consulted as to whether the bond should be given or not. In the opinion of the court (p. 419) it is said: "His [the creditor's] assent was not required. So far as he was concerned, the Sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent, were alike immaterial. He was powerless in any event to control the result." And again on page 420 it is said: "If the parties are in *pari delicto*, the law will help neither, but leaves them as it finds them." And the court held that the parties were not in *pari delicto* in that case. In the present case the bonds were not forced upon Mr. Palms.

Another very broad distinction is that the party estopped in the Daniels case had received the full benefit of the law; the *full consideration* which induced his action. His property had been restored to him on the execution of the bond, and he had received precisely the same benefit as though the Convention and bond had been in every respect valid. In the case at bar the respondents had *not* received the consideration which induced their action. That consideration was not the money which Mr. Palms paid to the contractors for certain bonds, which never went into the treasury of the district, and which no land owner ever received in whole or in part; but the consideration which moved *them* was the entire scheme of the Act of 1871, which contemplated not only the construction, but

the *maintenance* of a levee which would protect them from the waters of the Mississippi River, and which should be paid for by a system of assessments which might be lawfully enforced against *all* the lands in the district. This is clear, not only from the provisions of the Act itself, but from the very language of the petition (R., p. 445) which set the machinery of the law into operation, and from the testimony of numerous witnesses (R., pp. 63-4, 114, 115, 121, 129, 133, 149, 153, 277, 238, 238-9). The Daniels case does not apply here.

## XIV. The Case of Blake vs. The People.

The petition also seeks to show that the decision of the Circuit Court of Appeals is opposed to that of the Supreme Court of Illinois in the case of Blake vs. the People, 109 Ill., 504. We do not understand that conflicting decisions of State Courts have ever been held sufficient to give this Court jurisdiction of a cause or to warrant it in issuing writ of *certiorari*. The writ was refused by this Court in the case of "*In Re* Woods, Petitioner," 143 U. S., 202, although it appeared that there was a conflict between the position taken by the Circuit Court of Appeals and that of the State Court.

If it be true that the decisions of the state courts are not altogether harmonious as to how far an unconstitutional law may be enforced, this Court has no power to harmonize them—for its decisions have no binding effect upon the state courts. If every case decided in the Circuit Courts of Appeals in which it can be shown that state courts held diverse views as to the questions involved, is to be brought here, it would be nearly equivalent to allowing an appeal in all cases.

But we insist that the decision of the Circuit Court of Appeals in this cause is in no way in conflict with that of the Supreme Court of Illinois in the Blake case. That case arose with reference to certain assessments levied after the constitu-

tional amendment of 1878 and under the Act of 1879 passed thereunder, and was not intended to modify or overrule the decision in the Webster and Updike cases. Incidentally the question was presented whether or not the assessments in question were levied to construct or repair a levee constructed under any law of the State of Illinois—that is, as we understand it, any Act of the Legislature, or, any provision which at any time had been treated or acted upon as a law of Illinois. The citation quoted by counsel in his brief is a mere *dictum* in no way necessary to the decision of the cause which had been decided before that subject was taken up. Just preceding the quotation referred to the Court said, " It would, perhaps, be a sufficient answer to this to say that we cannot take *judicial notice* that the purpose for which the corporation was created was not, in the language of the second Section, ' to keep in repair drains, ditches and levees heretofore constructed under the law of this State,' and whether, in fact, it was or was not, was a question to be raised and determined by proof on the confirmation of the assessment roll, and it consequently now *comes too late*. But, *assuming* the question to be properly before us, it must be decided against appellant." Then follows the quotation given by counsel. The only parties to the proceedings in the Blake case were the Commissioners of the present drainage organization in their official capacity, and the defendant who was resisting payment of the assessment made by *that* organization upon his land. The owners of lands in the district were not before the court, and the question of estoppel was not presented in the case. It is inconceivable that Judge Schofield would have written an opinion, or that the court would have delivered one, intended to have the effect of estopping hundreds of land owners who were not before the court.

But if the above language is not a mere *obiter dictum*, and if the validity of the Act of 1871 was before the court in the Blake case, yet it was sufficient to maintain the validity of the

assessments involved in that case to hold that they were made to repair the old levee, and that that levee was constructed under an Act of the Legislature of the State then purporting to be law. The vital question was the existence of a levee to be repaired, not the validity of the Act under which it was constructed.

**XV.** The petition also refers to certain other decisions of various State courts, which it is claimed have a bearing upon the law of this case. As heretofore stated, we do not understand that it is the duty or the province of this court to attempt to harmonize what may be supposed to be conflicting decisions of State courts, and will, therefore, not consider those cases in detail. We will, however, remark that in all of the cases referred to, in which parties were held to be estopped from denying the unconstitutionality of an act of the legislature, it clearly appeared from the record that the law had been fully executed, and such parties had received the *full consideration* which purported to be given by the provisions of the law under which they had acted, as in the Pittsburgh and Columbus street improvement cases. In all of these cases the work comtemplated had been completed—the streets, for the improvement of which the assessment had been made, had been improved—and the parties who had asked that the assessments be made, and whose lands were held liable for the assessments in question, had received the full consideration which induced their action. The whole scheme of the law had been executed. There was nothing more to be done under it. It did not fail when half executed, as in this case. There is no case cited in which, for example, the work of paving a street was stopped before its completion by failure of the law under which the improvement was undertaken, such

failure not having been brought about by the parties who sought to secure the improvement. Some of the cases are placed upon the ground of estoppel, some of them on waiver and some on the implied agreement of the assenting land owners; but under whatever name they have been classed, the right to sustain the assessment has been upheld, if at all (in the absence of fraud or misleading statement which has been acted upon), upon the real ground of a fully executed express or implied agreement for which the party sought to be bound has received and retaind the *full consideration* which induced his action. A half-made street, or a half-constructed levee without power of completion and *maintenance* (the law under which it was undertaken having failed) has never been held to be such a consideration as would be the basis of an estoppel, or sufficient to sustain an implied contract.

Some of the cases referred to pursue the doctrine of estoppel to an unreasonable conclusion, as, for instance, in the case of Ferguson vs. Landrum, 5th Bush (Ky.), p. , the Court says, "John B. Robinson advocated the levy of the tax before the County Court, and thereby ratified it, and both he and Grigg (who did not advocate the levy), had either sons or *sons-in-law* who were liable to conscription;" and the conclusion reached by the Court was that said Robinson and Grigg were thereby estopped from denying the unconstitutionality of the Act in question, which was to pay bounties to volunteers, in order to fill the quota and avoid a draft for the Union Army; and the Court held, as a matter of law, that a man is so far benefitted by keeping his *son-in-law* at home that he is thereby estopped from denying the unconstitutionality of an act of the Legislature. This case of Ferguson vs. Landrum was also a case where the law had been fully executed—the entire benefits contemplated had been enjoyed. The exemption from the draft was *complete*. If the proceedings had broken down when only one-third of the draft quota had been filled, or if the commissioners had misappropriated all the

money raised under an unconstitutional law, and no portion of the quota had been filled, would there have been an estoppel? The reasoning of the Court in Daniels vs. Tierney would not apply to a case like that. The Circuit Court of Appeals did not introduce a new rule of decision in the Federal courts. It did not go contrary to Daniels vs. Tierney.

It is a mistake to say that either Judge Drummond or Judge Gresham held otherwise on this question. They did not have the present record before them. But, if they had so held, it would hardly do to urge this as ground for *certiorari*. It would be to say that when a Circuit judge is overruled by the Circuit Court of Appeals this Court must take jurisdiction.

**XVI. This Court was without jurisdiction to review this cause, prior to the Act of March 3, 1891, because the several assessments involved are separate and distinct claims, and each under $5,000;** and there is no question of such gravity or general importance presented in the petition as changes the general policy of the law on that subject or such as should induce this court to take jurisdiction of this cause.

The ground for giving the Circuit Court of the United States for the Southern District of Illinois original jurisdiction in this cause is the fact that it is between citizens of different States—it being averred in the bill that the complainants are citizens of the State or Michigan, and the defendants citizens of certain other States, chiefly of Illinois. In this class of cases the judgments and decrees of the Circuit Courts of Appeals are final under Sec. 66 of the Act of March 3, 1891; with the exception which makes it "competent" for this court to have any such case certified "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

As the decree in the court below was against complainants (here as petitioners), the amount in controversy is to be determined from the averments in the petition filed in this court, perhaps supplemented by the averments in the bill.

The bill, it is true, avers that complainants are the owners of so-called bonds issued by the Commissioners of the old Sny Island Levee District to the amount of about $350,000 face value; but it is not the purpose or prayer of the bill to obtain a decree against the old district, or its commissioners, or any party or parties for said sum. The averment as to the amount of these bonds seems to be in the nature of matter of inducement. The assessments made upon the several tracts of land in 1872 and 1875, by the old drainage organization, are the real basis of any equities claimed. In the prayer of the bill the court is asked to decree that "complainants and other holders of bonds are entitled to a first and prior lien upon all the assessments made upon the *several tracts of* land in said bill described," etc. (R., p. 44, 45); that the amount of the bonds may be determined, and "the amount due for principal and interest for the *several* assessments made against and upon *each* tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon *each* tract of land necessary to the payment of the principal and interest now due upon the bonds and coupons of your orators," etc. (R., p. 46).

The Act of 1871, under which the bonds were issued, provided that the commissioners should not be personally liable for the money borrowed, but that the indebtedness should constitute a "lien upon the assessments" (R., p. 402).

On page 2, Sec. IV. of the Petition, it is said: "Complainants' bill seeks to enforce against defendants' lands the *several* assessments levied thereon for the cost of constructing said levee under the provisions of an act of the Legislature of the State of Illinois, hereinafter stated. It is not a bill to enforce contributions

to, or collect proportionate amounts of, *a gross* sum, but simply a bill in the nature of a bill of foreclosure to enforce the liens of *several* and *specific* assessments levied on *several* and *specific* parcels of land upon the faith of which assessments the moneys which built the levee were advanced."

And on page 3 it is further said: "The bill implies the possibility, and the evidence shows, that in some cases the assessments may not be collectible because the land owners in those cases have not by their conduct or acts estopped themselves to deny the invalidity of the Statute. On this account the original bill filed by Mr. Palms listed *separately* in the bound book, 'Exhibit A,' each description of land assessed, the name of the owner and the amount of the assessment."

"In the present bill complainants in Exhibit 'X' list the same descriptions of land, the same assessments thereon, and the names of the owners at the date of the assessment, as in Exhibit 'A,' with the addition of the names of the owners at the time of filing this bill." And on page 47 it is said: "The bill is filed only to enforce the lien of the levee assessments. The validity and amounts thereof are the only questions in the case."

In order to entitle the petitioners to the writ of *certiorari* in this case, it is necessary that the petition should affirmatively show the right to the review sought. The court will not hunt through the record to see whether a case has been made aside from the petition.

Hubbard vs. Todd, 171 U. S., 474.

It then seems clear, both from the original and supplemental bill, as well as from the averments in the petition filed in this court, that the purpose of the bill is not to collect a gross sum, or proportionate shares of such sum, but to enforce the liens of the several and specific assessments described in Exhibit "X."

There are as many separate and distinct controversies as there are separate and distinct tracts of land.

If any or more of the assessments exceed $5,000, it would have given this Court jurisdiction as to such assessment, but not as to others less than that sum. None of the assessments upon any one tract aggregate more than about $1,132, with the exception of two, which appear to be a little in excess of $2,000 (both of which latter seem to be misprints), as stated in "Appendix A" to the petition.

As this is a proceeding against each separate tract of land, and not against the owners of lands personally, it is immaterial how many tracts of land any one defendant may own; but there is no averment in the pleadings showing that any one person owned at the time of the hearing in the court below, or when the bill was filed, enough tracts to give the court jurisdiction, even if it were a proceeding for a personal judgment.

There is no joint interest in the defendants.

The principle is stated in Adams vs. Crittenden, 106 U. S., 576, that "distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction," where the judgment or decree in favor of or against any one party does not exceed $5,000, exclusive of costs.

The same principle is announced in Farmers' Loan and Trust Company vs. Waterman, 106 U. S., 265 (271); in Tupper vs. Wise, 110 U. S., 399, and in numerous other cases, such as

Ballard Paving Co. vs. Mulford, 100 U. S., 147.
Henderson vs. Wadsworth, 115 U. S., 264.
Oliver vs. Alexander, 6 Peters, 143.
Seavers vs. Bigelow, 5 Wal., 208.

The latest case we find is that of Ogden City vs. Armstrong, 168 U S., 224, in which a part of the parties appealed from the assessments upon their several tracts of land, aggregating about $40,000; but, as the assessments against each defendant except one were less than $5,000, the appeal, on motion in this court, was dismissed as to all except the one appellant whose assessment exceeded $5,000.

It is clear, then, that no appeal could have been maintained to this court prior to the Act of 1891 as to such assessments.

There is no averment in the bill of any joint interest of the defendants, nor of any interest in one defendant in several tracts of land, such as would give this court jurisdiction if such interests could be joined. It would seem to be wholly immaterial whether one party owned enough separate tracts of land to reach the aggregate of $5,000 or not, as the averments are that the purpose of the proceeding is to reach each tract of land separately, being in the nature of a proceeding *in rem*. But if this is not the correct view, and if the several tracts which any one person owns could be joined to make up the jurisdictional amount, then the Appendix to the Petition shows but two or three persons the aggregate of whose holdings on the face of the Appendix exceeds that sum.

We understand that this court has interpreted the exception to Sec. 6 of the Act of 1891 as giving it *power* to review any of the cases made final in the Circuit Courts of Appeals, irrespective of the amount involved, when questions of sufficient gravity are presented, and that such power was reserved by the act of 1891 for the purpose of preserving uniformity of decision between the several circuit courts of appeals and this Court; but we do not understand that by said Act or any decision of this court the *general policy* has been changed as to reviewing cases which would not have been reviewable by this court prior to the Act of 1891. The general purpose of the Act was stated in American Construction Co. vs. Jacksonville, etc., Ry. Co., 148 U. S., 372 (referring to the granting of a writ of *certiorari*), that "It has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and *general* importance, or in order to secure uniformity of decision;" and in that case the writ was denied, although involving large property interests. It was granted in the case of Lau Ow Bew,

petitioner, 141 U. S , 583, and 144 U. S., 47, because that case involved personal rights under the Chinese Exclusion Act and the treaties of the United States.

The authorities are collected and reviewed in Forsyth vs. Hammond, 166 U. S., 506, and while the power of this court to grant the writ in such cases is reaffirmed, it is based chiefly upon the necessity of preserving uniformity of decision between the several circuit courts of appeal and this Court, and it is said that "It is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that (1) the importance of the question involved, (2) the necessity of avoiding conflict between two or more courts of appeal, or (3) between courts of appeal and courts of a State, or (4) some matters affecting the interests of this nation in its internal or external relations, demand such exercise." The numerals above inserted are our own. It clearly appears that none of the three causes last named occur in this case. There has been no conflict between two or more courts of appeal, nor between the Judges of one court, nor the Judges of the courts of appeals and the Judges of the circuit court. There has been no conflict between the decisions of the United States Circuit Court or the Circuit Court of Appeals and that of the Supreme Court of Illinois, for the decision of the Supreme Court of Illinois, in a direct appeal involving these identical assessments, is fully affirmed by the United States courts. There is certainly no matter affecting the interests of the nation in its internal or external relations. And, finally, there is no question of "general importance" involved. The only question presented by the Petition is whether some 700 separate tracts of land are subject to certain several assessments specified in the record, made in 1872 and 1875, because the parties then or since owning the lands have done certain acts which estopped them from setting up the invalidity of an Act of the Legislature of Illinois, which has been held unconstitu-

tional both by the State and the United States courts. It is a question of individual assessments and individual estoppels, involving a mass of testimony which would require months to unravel.

It would be putting a premium upon laches to hold that Mr. Palms and his representatives could delay this litigation until the law has been changed which gives this Court power to entertain jurisdiction over it, and then bring it here asking, in effect, that certain general principles of estoppel be established and the cause then referred to a Master to determine which of the defendants come within those general principles (p. 4 of Petition).

We earnestly insist that this is not one of the class of cases which the policy of the law requires should be reviewed by this court.

The petition refers to several other questions in the cause, and argued in the court below, which may not be considered of the first importance upon the questions involved in the hearing; but, as they are presented by the Petition, and to some extent argued, we will state the position of respondents in regard to them, as concisely as may be.

## XVII. As to notice to land owners.

By paragraph XXIII. of the Petition filed herein it is asserted that very many, if not all, of the land owners who acquired title to their respective lands since 1872 and 1875 did so with notice of the assessments made in those years. This may be true; but it is further true that those who had such notice also knew of the decisions of the Supreme Court of Illinois in the Updyke and Webster cases declaring those assessments void, and that they relied, and had a right to rely,

upon those decisions as rules of law and property, which protected their lands from the lien of any such assessments.

In this connection we will call the attention of the Court to the fact, established by the evidence, that a very large number of the defendants did not know of the original suit of Palms against the Commissioners of the old district until the present bill was filed in 1889, and summons served on the landowners, and that those who did know of that cause believed, and had good reason to believe, that Mr. Palms had abandoned whatever claims he had ever asserted (292, 340, 293-4).

It is asserted by the Petition (par. X.) that the assessments and orders were recorded in the recorder's offices of the respective counties in the district as required by the Act of 1871, and were, therefore, constructive notice. This is an error. The record shows that the assessments were not so recorded in the respective counties; that they did not appear on abstracts of title, and were not constructive notice—even if the Act of 1871 had been valid—as shown by the testimony of the official recorder and of abstractors of title etc. (R., p. 326, 330, 331).

**XVIII**. It is not denied, as stated in Par. XIX. of the petition, that, after the decision in the Webster case, and the filing of the original bill by Mr. Palms against the old levee commissioners, certain land owners organized the present Sny Island Levee Drainage District, acting under the constitutional amendment of 1878 and the Act of the Legislature thereunder of 1879; but it is denied that, after the decision in the Webster case, the old commissioners were in possession of the levee in any lawful sense, or that they were in any actual possession except as they permitted, so far as they could permit, certain land owners to repair it for the protection of their crops and lands (R., pp. 247, 68-70, 79, 80, 242). They did not take or hold possession of the levee under the order appointing them receivers (R., p. 68-70, 79, 80, 87, 90, 242, 277).

It is further denied that the old commissioners ever had any lawful right of way for the levee, or surrendered possession of it to the organization of 1880. That organization found a ragged and broken embankment along *a part* of the ground where they proposed to construct a *protective* levee; they could not remove the embankment, and to a certain extent they utilized it, but the testimony of Col. Prince, a capable civil engineer, thoroughly acquainted with the ground, shows that a better and cheaper levee could have been built upon an entirely new location, as matters existed in 1880, than by following the line of the old location in so far as it was followed (Testimony of Col. Prince, R., p. 112 *et seq.*).

**XIX.** It is asserted in Par. XXV. that all of the defendants who acquired title to their lands since May 4, 1878, are purchasers with notice of Mr. Palms' equities, because his original bill was filed on that day, and that the decrees thereupon of March 13, 1879, and July 7, 1880, were full notice of complainant's equities.

Neither the original bill nor said so-called decrees were "notice" to the present defendants, because they were not parties to that cause, and were not served with process. Moreover, those so-called decrees were in effect merely interlocutory decretal orders, and the Master's report was confirmed with the important qualification that the amounts found due were "without prejudice" (R., p. 440). We understand this to mean without prejudice to the rights of any land owners who might subsequently be made parties.

This court, in the case of Fourniquet vs. Perkins, 16 How., 82, held that orders of this character are interlocutory and may be set aside at a subsequent term. The opinion of Mr. Justice HARLAN contains a quite sufficient answer to this contention. He says (p. 36 of

opinion): "The plaintiffs can take nothing, as against the individual land owners, defendants in this cause, by reason of any order made in the suit instituted by Palms in the Circuit Court of the United States against the Commissioners designated under the Act of 1871; for the present defendant land owners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge Drummond did not intend to pass upon the rights of the land owners, but was of the opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the Act of 1871, he must bring them before the Court by supplemental bill."

## XX. No notice by lis pendens.

There is no notice in this case by *lis pendens*, for *lis pendens* does not begin until the filing of a bill and service of process thereunder.

Norris vs. Ile, 152 Ill., 202.
Bennet on *Lis Pendens*, p. 153.

It had ceased to be *lis pendens* before the supplemental bill was filed, even as to the original commissioners, Jones, Wheelock and Westlake, because it was not diligently prosecuted.

Herrington vs. McCullom, 73 Ills., 483.
Durand vs. Lord, 115 Ill., 621.
Norris vs. Ile, 152 Ill., 202.
Miller vs. Sherry, 2 Wall., 250.

## XXI. As to the answer of respondents.

We do not consider it essential to the proper understanding of the issues presented by the Petition that

we should follow in detail the averments of the Petition in regard to the pleadings and evidence. The answer of respondents is found on page 55-18 to 55-45. It is, perhaps, sufficient to say that the answer gives a general history of the district and litigation ; insists that the Act of 1871 is unconstitutional and the assessments and bonds void ; that respondents are not estopped from setting up such unconstitutionality by any act of theirs, or of any of them ; that complainants are barred by the laches of themselves and of Francis Palms ; denies that a protective levee was ever constructed, but avers that after the breaks in the levee in 1876 the value of the lands was substantially as low as before the enterprise was undertaken ; that respondents were in no way benefited by any advances contributed towards the construction of the levee up to that time ; but on the contrary were in a worse condition than if the enterprise had never been undertaken ; that no bonds were ever sold by the commissioners or any of the defendants to Mr. Palms ; that they received no money from him ; that the bonds in question were delivered to the contractors who constructed the levee in full payment for their work, and by them were disposed of on the market ; and, in addition to the defense of *laches*, very many of them set up defenses under the various limitation laws by possession and payment of taxes for seven years, or by actual residence under color of title, etc., as stated in the Statutes above referred to in the opinion of Mr. Justice Harlan.

## Mr. Palms Did Not Rely On Any Acts of Estoppel.

**XXII.** It is said in the Petition (page 40), that they (the land owners) "held out as an inducement the entire Statute. They asked the money and work of others upon the faith of all the provisions of the Statute, and by their conduct assured contractors and others that they would not attack the validity

of the law in any particular." We insist that the record of this case shows that Mr. Palms relied on the act of 1871 and the proceedings of the County Court of Pike County thereunder; and did not rely upon any assurances coming from land owners, and that the land owners did not "hold out" any inducements to him.

It is said on pages 30-31 of the petition that Wheelock and others "acting for such land owners" authorized the publication of pamphlet A (R., p. 385) which contained the opinions of eminent counsel that the law was constitutional, and the proceedings under it valid, etc. This pamphlet was not published by the Commissioners nor by any of the land owners; but it was published by the contractors who received the bonds for their work and had them to sell (R., p. 249, testimony of Hon. Geo. W. Jones). Moreover, "the opinions of eminent counsel" there published were not opinions obtained by the Commissioners; but were obtained by Mr. Palms himself as shown by the testimony of one of the complainants in this cause (R., p. 371-2). This testimony shows that "he (Mr. Palms) obtained the opinion of several western lawyers with reference to the validity of the bonds. He sent Col. Atkinson to Springfield, and I think he went to the county seat of the county where the work was located, to obtain the details pertaining to the issue of the bonds and for the purpose of learning as to the validity of the bonds. He came back with the report of the details pertaining to the organization and the issuing of bonds and presented an opinion in favor of their validity, which was submitted to George V. N. Lathrop and by him approved before Mr. Palms really invested." These opinions appear on pages 454-8 of the record. It, therefore, clearly and affirmatively appears that Mr. Palms relied "as to the validity of the bonds" upon the investigation and opinion of his own counsel, and *not* upon any act or acts of any of the parties defendant in this cause.

**XXIII. Lands purchased "subject to assessments."**

On page 40 of the Petition, Par. 3, it is insisted that the Circuit Court of Appeals in its opinion made no allusion to certain defendants who purchased their lands subject to these drainage assessments, and, as it is said, agreed to pay them.

The recitals referred to occur in a few warranty deeds, and amount to an exception from the warranty, as, for instance, "except levee assessments," etc. There was nothing in any of these recitals which contemplated the payment by the grantee of the assessments in question, or which showed that they formed a part of the *consideration* for the purchase; but they were merely referred to for the purpose of relieving the warrantor from any possible obligation on account of his warranty. There is nothing in such recitals to estop the defendants.

Bryan vs. Forsyth, 19 How., 334 (338).
Mehan vs. Forsyth, 24 How., 175 (178).
Lender vs. Kidder, 23 Ill., 49 (52).
Bryan vs. Melton, 125 Ill., 647.
Crawford vs. Nimmons, 180 Ill., 143.

**XXIV. Inadequate construction of the levee.**

The Petition (page 41, Sec. 4) refers to the statement in the opinion of the Circuit Court of Appeals that, "There was evidence tending to show—indeed, we think the weight of evidence was—that the levee built under the Act of 1871 was not adequately constructed;" and it is insisted that because, as it is claimed, the levee was accepted by the commissioners and their engineer, and the bonds delivered to the contractors, all questions as to the character and sufficiency of the construction of the levee had been conclusively and finally decided, and cannot be set up as a defense to the assessments.

If this were a suit between the petitioners and the drainage district as a corporation, it is possible that the above position might be well taken, and that the corporation would be estopped from asserting the faulty construction of the levee, by way of defense, on account of the acts of its agents. A different case, however, is presented here. This is a suit in equity by the petitioners seeking to charge the several tracts of land owned by respondents with certain sums of money on account of benefits alleged to have accrued to their lands by reason of the construction of a *protective* levee with funds furnished by the petitioners—it being conceded, in effect, that petitioners have no legal claim.

As the basis of such supposed equities, the supplemental bill contains averments that, prior to the construction of the levee in question, the lands were "swampy, wet and subject to overflow by the waters of the Mississippi River, and were of small value, not exceeding an average of fifty (50) cents per acre, and an average assessment of about $6.00 per acre upon said lands * * * greatly exceeded the then market value of said lands;" and that by the use of funds advanced by Mr. Palms and others the value was advanced to an average of about $25 per acre (R., pp. 42-3). In such case it is right and proper, as we insist, that respondents should be permitted to show, as they have done, and as was found by the Circuit Court of Appeals, that the levee which is asserted by petitioners to have been made protective was not, in fact, a protection to the lands of respondents; that they never received any benefit from the same, nor from the funds invested by petitioners in the bonds in question; and that, therefore, the equities based, wholly or in part, upon such supposed benefits, are without foundation.

## As to a Common Source of Title.

**XXV.** On page 46 of the ~~opinion~~ Petition (Par. 6) it seems to be insisted that the respondents claim from a common source of title with petitioners, and, therefore, cannot set up the defense of adverse possession with payment of taxes for seven years, etc., and it is said that no adverse possession can begin to run against one who has no right to recover possession.

We respectfully submit that there is no "common source of title" shown in this record between petitioners and respondents.

## XXVI. As to Adverse Possession, etc.

The record shows that any land owners who knew of the claims of Mr. Palms or other bondholders have consistently and at all times denied such claim and refused to recognize the lien of the old levee assessments since the decision of the Supreme Court of Illinois in the Updike and Webster cases in 1876. Under such circumstances any party in the possession of land having a deed regular on its face, may rely on such deed as color of title, and such color of title, taken in connection with payment of taxes and possession for seven years, forms a complete bar. This defense may be made as well in a proceeding in equity as in one at law.

Hinckley vs. Greene, 52 Ill., 223 (228).
Chickory vs. Failes, 26 Ill., 507 (520).

We are not considering the case of a lien in every way valid against land, and properly recorded, of which every subsequent purchaser must take notice; but a case in which the assumed liability is based upon an estoppel *in pais*, and which depends for its validity not upon a recorded assessment roll but upon certain acts and conduct of the various parties who, at one time, owned the lands in question, which must be proved

by evidence *dehors* the record. As to all such matters, the Statutes of limitation may be relied upon as a defense.

## XXVII. The cases of Litchfield vs. Ballou and Ætna Ins. Co. vs. Middleport.

The Petition on page 3 insists that the cases of Litchfield vs. Ballou, 114 U. S., 190, and Ætna Ins. Co. vs. Middleport, 124 U. S., 524, are not applicable as showing any defense in this suit. The citations made from these cases by Mr. Justice HARLAN in the opinion of the Circuit Court of Appeals are so appropriate that it is perhaps unnecessary for us to add anything to what is there said. But with reference to the application of the Litchfield case we will call the attention of the Court to the fact disclosed in this record that Mr. Palms' money did not enter into the construction of the levee; that, at most, it went to purchase bonds issued after each section of the levee was constructed; that whatever was expended by the contractors was intermingled with that furnished by hundreds of private individuals, by the new levee and drainage district, by three railroad companies, and at least $50,000 expended by the United States Government. Therefore, neither the money of Mr. Palms (if it had entered into the levee) nor its product could be specifically identified; and no lien could be given for it under the authority of Litchfield vs. Ballou.

### Subrogation.

As to the application of the case of Ætna Insurance Co. vs. Middleport, we will call the attention of the Court to the following facts: In the case at bar no bonds were sold by the commissioners of the drainage district to Francis Palms or to any one representing him (R., p. 372). They were delivered to the contractors who constructed the levee. If the con-

struction of the levee created any equities in any one it was in favor of the contractors who constructed it, and all of these supposed equities existed before Mr. Palms obtained his bonds. Therefore, he cannot assert such equities (assuming that his bonds are not legal obligations) unless he can be subrogated to the rights of said contractors. This he cannot do under the authority of the above case. We insist that it is precisely analogous. In both instances corporations undertook the construction of certain works and employed contractors to do the work. In both cases the contractors were paid by bonds issued by the corporations. In both instances the bonds were held practically void as to the corporations issuing the same. In both, the purchasers of the bonds claimed subrogation to the rights of the contractors from whom the bonds were purchased. It is true that in the present case the bill does not in specific terms claim the right of subrogation; but if we are right in showing, as we have done, that Mr. Palms is, in fact, only seeking to reach equities which originally belonged to the contractors, if they existed at all, then this Court has held in the Middleport case that the purchasers of bonds under such circumstances as are shown in this case, who purchased them in the open market as a matter of speculation and not from any compulsion, acquired no interest which entitled them to be subrogated or placed in the shoes of the contractors. Mr. Palms is in this case a mere volunteer, and we insist that under the authority in that case he had no standing in the Circuit Court.

While the opinion of the circuit court of appeals refers favorably to the above cases, the decision is not based upon them; yet it seems clear that they furnish an additional ground of defense, should such be necessary.

## Conclusion.

Almost a generation has passed since this litigation commenced. As the years went by and Mr. Palms continued as silent as the tomb the land owners believed, and had a right to believe, that he had completely abandoned the levee and all things connected with it. But for the land owners every vestige of the old levee would have been washed away. While he was sleeping or waiting for them to make his security valuable, they were building up their homes and setting up their household goods. Roads were constructed, fences built, fields broken, and, in fact, all the appliances of an industrial community were being established. When the few who had ever heard of Mr. Palms' original bill had forgotten all about it; when Mr. Palms' own conduct gave to the community the strongest assurance that can be given by mere conduct, that he had entirely abandoned his supposed cause of action, his executors step forward with a new bill, pretending to call it a bill of revivor—*thirteen years* after the decision of the Supreme Court of Illinois that the assessments in question were void, and *nine years* after he was granted permission to proceed against the land owners, and then, for the first time, make them parties to the litigation.

In the meanwhile, the owners of the land had changed greatly. The years were doing their work. Sales and mortgages, incumbrances and transfers were going on from week to week, and the currents of life and death were proceeding as they always will proceed. Through it all the people were struggling to save their property, and still Mr. Palms paid no attention to this suit or the district. When, years afterward, the law and the constitution had been changed at great expense to meet the new conditions—when by such means the land owners had produced a new mode of protection for themselves and new value had

been given to the property—Mr. Palms' executors come in with a new bill against new parties. We maintain that before this last bill was filed Mr. Palms had in law and equity abandoned the lands and levee, and all claims that he had against the land owners and their property.

He remained silent when he should have spoken, and with the very purpose, as the Petition states, to allow the respondents to make fresh expenditures upon the property; and now he or his executors cannot be heard to speak when they ought to remain silent.

We earnestly insist that this litigation which has continued for about a quarter of a century, in various forms, should cease, and that by every principle of equity this Court should deny the Petition for a writ of *certiorari*.

Respectfully submitted,

BENJAMIN HARRISON,
THOS. WORTHINGTON,
Counsel for Respondents.

ASA C. MATTHEWS,
HARRY HIGBEE,
ALBERT G. CRAWFORD,
Of Counsel.

IN THE

# SUPREME COURT OF THE UNITED STATES

## October Term, A. D. 1900.

MICHAEL W. O'BRIEN ET AL., EXECUTORS, ETC.,
*Complainants and Petitioners.*
vs.
JOHN G. WHEELOCK, ET AL., *Respondents.*
No. 241

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## STATEMENT AND BRIEF FOR RESPONDENTS.

### I.

*May it Please the Court:*

Under the rules of this court, as we understand them, it is necessary that a statement of the facts of the case be given by the counsel for petitioners, and counsel for respondents are required to point out any omissions or incorrect paragraphs in the statement so made on behalf of petitioners, which are deemed of sufficient importance for notice.

In this case a statement has been made by counsel for petitioners which is in the main correct so far as it goes. But some mistakes have crept into the statement, and elements of some importance have been omitted therefrom. No doubt all this was done through inadvertence. And, indeed, this is not to be wondered at, in view of the immensity of the record and the many facts, dates and propositions of law necessary to be set forth. A large part of the statement for petitioners is taken up with the analysis of the bill of complainants. We desire carefully to distinguish between the mere averments of the bill and the facts as established by the evidence.

We may, perhaps, be pardoned if we incidentally repeat a small part of what has been said in the statement for petitioners. The bill upon which the present action is based is called on its face at the outset an original bill in the nature of a supplemental bill and bill of review, and was filed April 22, 1889, by the executors of the last will and testament of Francis Palms, deceased, vs. John G. Wheelock and George W. Jones, formerly commissioners of the Sny Island Levee District, organized under the act of 1871; also against about eight hundred or a thousand parties who were the owners of, or interested in, lands in said district, and also against the Sny Island Levee Drainage District, a corporation organized under the orders of the County Court of Pike County, Illinois, in 1880, after the constitutional amendment and legislation thereunder, which will be hereafter referred to. Counsel for petitioners, in his brief, refers to this

bill as one of supplement and *revivor*,and treats it as such throughout. We shall, therefore, consider that the statement on the face of the bill, that it is a bill of review, is an inadvertence. The bill purports to be supplemental to a bill filed by Francis Palms in his lifetime, on the 4th day of May, 1878, (Trans. p. 410). Its purpose is to collect certain bonds owned by said Palms, and the interest thereon, by the enforcement of certain assessments against the lands in said district, levied by the orders of the County Court of Pike County, Illinois, under the provisions of the Act of April 24, 1871, hereafter to be fully considered.

We will assume that counsel for petitioners has given a sufficient analysis of the averments of his bill in the brief filed herein, and we will not repeat those averments; but we desire to call the attention of the court to the fact that this analysis is of the bill as *amended*,and not as originally filed, and not as it stood when the demurrer hereafter referred to was argued and determined. The amendments to the bill appear on pages 47 to 51 inclusive, and were not made until the day that the cause was heard in the Circuit Court on the 5th day of November, 1895, long after answers had been filed and the testimony taken in the cause, as appears by the certificate of the Clerk of the Circuit Court dated May 25, 1898. (Trans. p. ———).

It is said on page.....that "The levee has, during and since its construction, been at all times in the possession of defendants and their ancestors and assigns through commissioners of their own choosing." We do not think this

a strictly correct statement. The testimony of Messrs. Wheelock and Jones shows that they did not consider that they had any legal authority over the levee after the decision of the Supreme Court of Illinois at the January Term, 1876, holding the Act of 1871 unconstitutional; and that whatever they did with reference to the repairs of the levee thereafter was in a private capacity, representing themselves and certain land owners. (Trans. p. 69, 79-80.)

Counsel for petitioners seems to concede that the Act of 1871 was unconstitutional, and that he must rely solely upon estoppel as the basis for his case, by the following language: "The bill implies the possibility, and the evidence shows, that some of the assessments may not be collectible, because the land owners in those cases have not by their conduct or acts estopped themselves to deny the validity of the Statute." (P. 2.)

THE ACT OF APRIL 24, 1871.

The Act of April 24, 1871, is referred to but not fully abstracted in the brief of counsel; and a part of it is summarized in the opinion of the Circuit of Appeals, Trans. pages 511 to 517. It is printed in full in the Transcript, pages 394 to 404. We will refer, briefly, to a few of the provisions of the Act. It relates only to drains and ditches, as the primary consideration, and not to levees, except as an aid to drainage. Section 1 provides that whenever *one* or more owners or occupants of lands desire to construct a *drain or drains, ditch or ditches*, across the lands of others

for agricultural or sanitary purposes, that the person or persons may file a petition in the County Court of the county in which the drains or ditches shall be proposed to be constructed, and that if it shall be deemed necessary for the *drainage* of the lands of such petitioners that a levee or other work be constructed, the petitioners shall so state and set forth a general description of the same.

This Act was drawn in an attempt to meet the requirements of Article 4, Section 31, of the Constitution of 1870, providing that the General Assembly might pass laws permitting the owners or occupants of lands "to construct *drains and ditches* for agricultural and sanitary purposes across the lands of others."

*1 Starr & C. An. Stat., 2d Ed. p. 139.*

It should be noted that under this Act any one person, whether an owner or a mere "occupant" of lands might set the whole machinery of the law in operation, and that no personal notice was required; but all the notices specified in the Act were to be given by publication and posting. (Trans. 394, Secs. 1 and 2, etc.) Other provisions of this Act will be referred to in other parts of this statement and brief.

ACT OF APRIL 19, 1872.

This Act provides for the registration of bonds issued by the Drainage Districts organized under the act of 1871, and appears in the Transcript at pages 405 and 406. We have already called attention to Section 3 of this

Act, relating to the method of collecting assessments, as state and county taxes are collected.

AS TO THE STATEMENT OF FACTS FOR PETITIONERS.

The statement of facts contained in the brief for petitioners is very meager, in view of the immense record here presented. The record embraces not only the printed volume, covering some 550 pages, but a large number of original documents and exhibits, and of copies of records, which were submitted to the Circuit Court of Appeals in their original form by order of the Circuit Court.

It is stated in the brief of counsel that "certain appeals were taken from these assessments" (made by the jury in the County Court of Pike County), "and all the others were confirmed." These are doubtless the appeals referred to by Col. Atkinson in his opinion obtained for Mr. Palms. (Trans. pp. 371-2 and 457).

It is further said, (p. 11) that "the court directed that the assessments be paid in ten annual installments, commencing in 1882, with interest from the first day of October, 1872. Certified copies of said order for Pike, Adams and Calhoun Counties were made by the commissioners and were recorded in said counties on or before December, 1872." This statement is not sustained by the evidence. It is true that the Act of 1871 provided (Sec. 28, Trans., p. 400) that a copy of the assessment roll of the assessments made under direction of the County Court, should be recorded in the

several counties in which the lands were situated. But the evidence shows that this was not done, at least as to the counties of Adams and Pike. The testimony of George W. Archer, Circuit Clerk and Recorder of Pike County, shows that no such record exists, or has ever existed, in Pike County (Trans. 326), and the same appears in the testimony of Messrs. L. A. & E. J. Chamberlain, abstract makers; and such assessment did not appear upon any abstracts of title made in said counties.

It also appears from the testimony of Mr. S. E. Hewes, that no such record exists in Adams County of the assessments made in 1872 and 1874, although the assessments of 1880, under the new drainage organization is found recorded. (Trans. p. 326).

It is further stated that the commissioners acquired the title to the lands required for the site of the levee. This statement is not correct, except as relates to a few instances. The testimony of Col. Clark and Mr. Jones shows that they obtained a right of way for the levee in but few cases; that it was constructed chiefly through wild lands, and that they simply "ran over it." Also, that it was built in several instances on the 16th section, the title to which was in a State for school purposes. (Trans. 90).

It is stated (page 13) that the contractors constructed the levee in accordance with the plans and surveys of the commissioners, and with the approval of the engineer in charge, to such a height that the lands were protected from overflow from the Mississippi river and were rendered healthy

and productive. There is some testimony in the statements of Messrs. Corthell and Parkhurst, engineers in charge of the work under the old levee commissioners, to the effect that the levee was constructed in accordance with the plans and surveys of the commissioners, but there is an overwhelming mass of testimony in the transcript to show that they were mistaken in this respect. Mr. Jones says that the levee never was completed, but was perhaps accepted by the commissioners as though it were completed, because they had no further funds with which to prosecute the work. Trans. pages 81, 82 and 83. The testimony of Mr. Clark, Trans. p. 62, etc.; of Mr. Gay, Trans. p. 278; E. J. Chamberlain, Trans. pp. 214-226; H. P. Dodge, 239-241, and of many others, goes to show the levee was very defectively constructed. But the statement that the levee was constructed to such a height that the lands were protected from overflow by the Mississippi river and were reclaimed and rendered healthy and productive is especially incorrect. As a matter of fact, the levee broke the first time it was subjected to any considerable high water, and when the stage of water was much below that of 1851 and the lands were flooded many times. For the evidence of this we will refer to paragraphs hereafter.

It is also said (p. 14) that the commissioners continued in possession of said levee, and by the use of it protected their own lands and the lands of the other defendants from overflow, etc., and that the commissioners of the Sny Island Levee Drainage District, created in 1880 under the act of 1879, based upon the constitutional amendment of 1878, received

the surrender of the levee from the original Sny Levee commissioners. Both of these statements are incorrect. It is clearly stated in the testimony that the old commissioners exercised no rights of authority over the levee after the decision in the Webster case at the January term of the Supreme Court in 1876; that they merely, on account of their greater acquaintance with the work, acted in their private capacity in assisting certain land owners to make repairs to the levee and prevent it from being damaged. This they did in their private capacity, and as trustees under the trust deed of 1877, which had no reference whatever to the assessments under the Act of 1871. They state that they did not accept the duties supposed to be imposed upon them by the order of the Circuit Court making them receivers of the levee, and well they might say so, for they had not a dollar nor the means of raising a dollar with which to discharge the duties which the court sought to impose upon them and which they never accepted; and they did not undertake to hold and surrender the old levee to the new organization. See testimony of J. G. Wheelock, Trans. 68, 69 and 70; G. W. Jones, Trans. p. 79-80, 87, 90; H P. Dodge, Trans. p. 242; W. H. Gray, Trans. p. 277, etc. Messrs. Jones and Wheelock, former commissioners, state that they considered their rights and duties as commissioners ended with the decisions of the Updike and Webster cases, early in 1876, and the above citations from the testimony show clearly that the commissioners did not exercise any functions *as commissioners*, after the decisions in those cases; but that in their private capacity they acted as trustees under a number of separate trust deeds (only one appearing

in the Transcript), covering in the aggregate less than one-third of the land in the district, and authorizing them to collect a sum not exceeding fifty cents per acre for the reparation of the levee. (Trans. p. 462.) These trust deeds were executed in the nature of a mortgage upon the personal responsibility of the men who made them, and had no reference to the assessments made under the Act of April 24, 1871.

It seems to be fully conceded in the brief (page —) that the Supreme Court of Illinois held the Act of 1871 unconstitutional, as decided in *Updike vs. Wright, 81 Ill. 49*, and *Webster vs. The People*, unreported. (Trans. 459.)

The references to the testimony above made will show that counsel for petitioner is incorrect in stating that in 1880 the Commissioners of the newly created Sny Island Levee Drainage District received the surrender of the levee from the original Sny Levee Commissioners. No such position had been held by the original Commissioners since 1876, and it was not transferred as above stated (Trans. 87-90).

It appears from the statement of counsel, that prior to the filing of the supplemental bill in this case, on April 22, 1889, the bonds of the old drainage district, which had fallen due according to their terms, amounted to fifty thousand dollars in each of the years 1882, 1883, 1884, 1885, 1886, 1887 and 1888, aggregating $350,000, under the original assessment; but it should be added that the interest on the bonds

fell due annually, as well as upon the several assessments, and that assessments were permitted by the Act of 1871 in each year to pay the interest. (Trans. 469-470.)

It is stated that the defendant commissioner, Westlake, died, and no successor was appointed in his place, but that the other defendants, Wheelock and Jones, remained commissioners as aforesaid. It is true that Mr. Jones is still living; Mr. Wheelock was living when the testimony was taken in 1893, but has now been dead for a number of years.

It is stated (page —) that before the construction of said levee, the entire body of lands in the district were wet and swampy and subject to overflows of the Mississippi river, and not worth in valve an average of fifty cents per acre; that while the average assessments per acre greatly exceeded the then market value of said lands, it was expected and promised by the landowners and commissioners that the construction of the said levee, as proposed, would drain said lands and protect them from overflow and render them healthy and productive, and so greatly enhance them in value as to make them ample and desirable security for said assessmens; that complainant's testator, relying upon said representations, was induced to purchase and pay for said bonds, etc. We wish to say that this record contains no evidence whatever of such promises or representations; and that if any such assurances had been made, looking to the future, they would have furnished no basis for estoppel.

It is said that the defendants who acquired title to the lands now claimed by them, since May 4, 1878, are purchasers with notice, on account of the filing of such original bill, and that they also had notice on account of the orders of the Circuit Court in 1879 and 1880. These matters will be fully considered under the subject of "*lis pendens*" in a later part of this brief.

Copies of the bonds of the series of 1872 and of 1875 may be found in the transcript on pages 469-71. It is conceded in the brief for petitioners that these instruments are not bonds in a legal sense (p. 5). They are not negotiable instruments. *N. O. vs. Warner, 175 U. S. 120 (128).*

A chronological reference to some of the more important matters connected with this case may be of assistance to the court.

The litigation commenced in 1872, when the Commissioners filed in the County Court of Pike County their assessment roll, and appeals were taken therefrom. (Trans. p 457.) Certain landowners in the lower part of the district, who claimed that their lands would not in any way be benefited, owing to the backwater which would inundate them by coming around the lower end of the levee in every season of high water, opposed the enterprise from the beginning. Their objections were decided adversely by the County Court of Pike County, and, on appeal, by the Circuit Court of said county. They then took the case to the Supreme Court of the State, where the decisions in the cases of *Updyke vs. Wright, 81 Ill. 49*, and *Webster vs. The People* (unreported,

Trans. p. 459) were rendered at the January term, 1876. In April, 1876, the levee broke and the lands were devastated, as will be hereafter described. On May 4, 1878, Mr. Palms and others filed their original bill in the Circuit Court of the United States for the Southern District of Illinois. On March 13, 1879, (Trans. 437) an order was entered permitting them to bring the landowners into court and test the question of their liability, and the cause was referred to the Master, and on July 7, 1880 (Trans. 438) the Master's report was approved, complainants again given permission to make the landowners parties; and this was the last order taken during the lifetime of Mr. Palms. He died November 24, 1886. His executors obtained leave to file a supplemental bill in January, 1889, and the present bill was filed April 22, 1889. The cause was heard in the Circuit Court in November, 1895, and a decree entered on February 10, 1897, dismissing plaintiff's bill. An appeal was perfected to the Circuit Court of Appeals for the Seventh Circuit, which was heard in June, 1898, and the decision announced in June, 1899.

It will, therefore, be seen that some of the questions involved in this cause have been before the courts in some form for nearly thirty years.

Counsel who have prepared this brief represent those defendants named in the answer of John G. Wheelock et al., which appears in the Transcript on pages 55-18 to 55-45 inclusive, and the answer of the non-resident defendants, represented by same counsel, appears on pages 55-46 to 55-51 inclusive, and the amendment to the answer on pages 55-53 to 55-58.

Without undertaking to abstract said answers or to anticipate the argument, which is to follow, we will say that the more important points upon which respondents rely in this case are, in brief, as follows:

First—That the Act of April 24, 1871, under which all the proceedings were conducted in the County Court of Pike County, referred to in this case, was unconstitutional and void; and hence, all the proceedings thereunder are void.

Second—That there is no estoppel against any of the parties who participated in procuring the enactment of said act, or in taking any of the steps referred to in the County Court of Pike County, Illinois, for the reasons briefly stated, that such parties relied upon (and accepted, so far as any of them accepted) said act of 1871, and all of its provisions as a whole, more especially relying upon that part of the act relating to additional assessments and powers of the commissioners for the repair and maintenance of the levee; that such provisions were the principal considerations which induced any of the land owners to take part in the proceedings, and that none of them would have participated in any way under said act except for the provisions of the act itself in that respect, and that this consideration failed when the Supreme Court of Illinois declared the act unconstitutional, and there was no further power under the act to repair and maintain the levee, which was destroyed by the floods of 1876.

Third—That the appellees were not guilty of any fraud, negligence or misrepresentation whatever, and that appellants in purchasing the bonds relied solely on their own judgment and that of their counsel, and did not rely upon any assurance given by, or acts or silence of, the defendants or any of them. That said defendants were not parties to the bonds in question either as drawers, makers or endorsers, and said instruments are not commercial paper as against them or any of them. That appellees being guilty of no fraud or negligence committed no tort and could only be estopped by entering into an expressed or implied contract with reference to which appellants assumed the position of parties of the other part.

Fourth—That the former orders of court to which reference had been made by appellants' counsel were merely interlocutory and were not final and could not and did not operate upon any of the appellees who were not before the court entering such orders. That such orders on their face purport not to be conclusive but to be "without prejudice." That appellants cannot claim notice to any one under the doctrine of *lis pendens* growing out of the proceedings in the County Court of Pike County or out of the proceedings under the original bill filed against commissioners alone; as the proceedings in Pike County were not a suit and did not require process and no process was issued therein, and the said appellees were not parties to the said first bill filed in the Southern District of Illinois under which said orders were made, nor in privity with any of the parties thereto.

Fifth—The appellants, by failing to prosecute their original suit begun May 4, 1878, (the last order in which was taken July 7, 1880), allowed the same to lapse, even if it ever had any effect as to the present appellees, which it certainly never did.

Sixth—The appellants by their laches in failing to set up and prosecute their alleged equities and to establish their right to a lien on the lands in question for a period of about nine years, during a most extreme crisis affecting all the appellees, lost their alleged rights in equity and in fact estopped themselves from now asserting the same. Many defendants always rely on the several statutes of limitations.

Seventh—That appellants purchased their bonds not from the levee district or the commissioners thereof, but from the contractors who had done the work. That the money of Francis Palms did not build the levee or buy the right-of-way, and that neither he nor his representatives, the present appellants, can be subrogated to any rights which the contractors might have had in law or in equity, and that any appropriation of the levee or the remains thereof by some of the defendants, or by the present district, did not concern the appellants, they having no lien upon, or equity in, said levee.

Eighth—That especially, appellants cannot be heard to set up any claim on the ground of estoppel arising out of events which occurred long after they purchased their bonds.

Ninth—That the supplemental act of 1872, authorizing the bonds to be registered with the Auditor of State, shown in

the Transcript on pages 405 to 406, permitted the bonds to be registered by the Auditor, and, in that event, required that thereafter the assessments upon the property in the district should be extended and collected in the same manner as state and county taxes, and at the same time expressly took away the power of the commissioners to make such a collection. (Section 3, page 405, Trans.) That the bonds were registered with the auditor by the contractors who received them. (Trans. p. 81.) That the law having provided the method for collecting such assessments, the courts are powerless to prescribe or require any other method, and this is especially true as to the Federal Courts.

Tenth—That there being no tort committed by the appellees, the appellants not being deceived or misled, appellants could only acquire a lien, if at all, under the doctrines which control contracts, and would be bound to see that the consideration which induced the appellees to make any expressed or implied promise to submit the lands to the assessments had been duly and substantially received, and as that consideration never was received, and appellees never received that for which they contracted (if they ever contracted for anything) they cannot be held to be estopped to deny their liability.

ADDITIONAL STATEMENT OF FACTS.

In addition to the facts heretofore referred to, either in the brief for petitioners or in our remarks upon the same, we desire to present the following statement of certain facts which we think should be presented at this time.

While the testimony in this record is voluminous, a a large part of it relates to the title and condition of specific tracts of land and the connection of the owners thereof, if any, with the various proceedings described in the bill. Many of the owners show that their losses at the time of the decision of the Webster case and the breaks in the levee, which occurred substantially at the same time, greatly exceeded any benefits which they had at that time, or have since, derived from the same. Many of them also introduced their deeds and tax receipts in evidence, and relied on the Statute of Limitations of the State of Illinois of seven years' adverse possession and payment of taxes under color of title; or seven years of payment of taxes under color of title, as to unoccupied land; or seven years' actual residence on the land under a title deducible of record from the State or the United States. Many show that they had no connection with any of the proceedings referred to in the bill, and many always opposed the scheme. See testimony of A. L. Galloway, p. 293; S. Shewe, 300-301; C. W. Reed, 295, and many others.

I. The first class of defendants, who it is claimed, are estopped from denying the validity of the Act of 1871, are those who participated in "soliciting and procuring the passage" of the act. In his testimony, Col. Clarke says, that for the purpose of procuring the necessary legislation, he consulted counsel, and "worked independent of anybody." He is the only person in this class, (Trans. 62), unless two

or three others are included who contributed small sums toward his expenses. (Trans. p. 59.)

The next class named consists of those who became members of the "Mississippi Levee Drainage Company," a voluntary organization of a few land owners, made after the passage of the Act of 1871, for the purpose of getting its provisions before the people, and of subsequently effecting a legal organization. They contributed very small sums for this purpose, and very few, if any of them, are now living, or own land in the district. (Trans. pp. 59, 62-3.)

The two principal classes of defendants, against whom it is sought to enforce an estoppel, are, first, those persons who signed the petition for the organization of the original Sny Levee District, in 1871, by which the first issue of bonds in question was made, and, second, those who signed the petition for the second assessment, under which the second issue of bonds was made.

The number of names attached to the original petition is 115. (Trans. pp. 442-7.) The testimony shows that a considerable number of these, perhaps 10 or 12, were not land owners, but were mere tenants or "occupants." (See testimony of Massie, Trans. p. ; testimony of Gay, Trans. p. .)

"Exhibit A," which was filed with the original bill, contains copies of the assessment rolls of the district for the years 1871 and 1875, with a description of each tract of land and the name of the owner, if known; if unknown, it is so stated. The

roll of the first assessment (the second in Ex. A) shows the names of 340 separate land owners who were then "known," and there were 373 tracts of land whose owners were then unknown. It therefore appears that the number of owners of land in the district at the beginning of the enterprise was from five to six times greater than the number of those who signed the petition for the organization of the district; and that even the number of those whose names were "known" to the organizers was more than three times greater than the number of those who signed the petition to set the machinery of the law in operation.

The petition for the second assessment is not contained in the printed transcript, but it is a part of the record transmitted to the Circuit Court of Appeals, and thence to this court, and by the stipulation of counsel and order of the court may be referred to by either party. This petition is signed by 52 names, while the number of owners of lands in the district at that time, as shown by said "Exhibit A," is more than *eleven times* greater.

It is not conceivable that one man in five, in the first instance, or one man in eleven, in the second, would have consented to take any steps for the organization of the district except in reliance upon the entire Statute by which, if valid, all the lands in the district might be made to contribute their just proportion not only for the building, but for the maintenance of the levee.

There is no proof in this record that the right of way

for the original levee was obtained in any lawful manner (even had the Act of 1871 been constitutional) by the commissioners of the original district. Col. Clark says that the right of way was bought and conveyed to the commissioners in a few instances and condemned in none. No such deeds have been offered in evidence; they are not on record and cannot be found. Mr. Jones, one of the original commissioners, says that the work was prosecuted over a very unsettled portion of the Mississippi bottom; that there were large tracts unoccupied, whose owners were unknown, and that they simply "ran over it." (Trans. pp. 89-90); that they built the levee through the 16th Section in several places, the title to which was in the State, for school purposes. If the act of 1871 had remained in force, the right of way might have been obtained against any objecting land owner by condemnation; but since the overthrow of the act any parties interested must, on the theory of petitioners' bill, depend upon this matter of consent or estoppel for title to the right of way, and it is evident that non-resident land owners, who knew nothing of the work, and those who gave no consent, and those who resisted, and the State of Illinois itself, would not be bound by estoppel. Therefore, perhaps not more than one man in ten or twenty, whose land was traversed by the levee, would be bound, under the theory of complainants' bill, to permit parties to enter upon the land for the purpose of repairs; and we would have the spectacle of an attempt to keep out the great Mississippi river by levee, one-tenth of which might lawfully be repaired and a nine tenths might not.

The foregoing are the only classes of defendants who took any action in the premises prior to the issue of the bonds in question and their purchase by Mr. Palms, with the exception of those who paid their assessments for the year 1874, and a few also for the year 1875, which assessments, it is alleged, were used to pay the interest due to Mr. Palms and others on the first issue of bonds.

There are other classes of defendants against whom an estoppel is alleged, on account of conduct occurring *after* the purchase of bonds by Mr. Palms. These are the persons who, in 1877, signed certain deeds of trust, embracing about one-third of the lands in the district, by which the owners voluntarily agreed to contribute sums not exceeding fifty cents per acre toward the repair of the levee; those who "participated in procuring" the submission and adoption of the constitutional amendment of 1878 and the passage of the act of May 29, 1879, under the provisions thereof; those who signed the petition for the creation, in 1880, of the present Sny Island Levee Drainage District, and parties who had notice of these various matters.

All of the foregoing classes will be considered somewhat in detail in a subsequent part of this brief, under the subject of "estoppel," in an argument prepared by General Harrison.

II. The inducement and consideration which led the land owners to enter into the enterprise, and to take whatever action some of them took in connection with it, was not

only that the levee should be built, but that it should be perpetually maintained by a system of compulsory assessments on all the lands in the district, as provided in the Act of 1871.

Section 34 of the Act provided that "The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out, constructing, *repairing*, altering, enlarging, cleansing, *protecting and maintaining* any drain, ditch, levee, or other work for which they shall have been appointed," etc. (Trans. pp. 401-2.)

Various sections of the Act provided for the levy and collection of assessments for the original construction of the work proposed.

Section 39 (Trans. 403) provided that "Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners, or *any owner or occupant* of lands affected by any work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, *protect or maintain*, any drain, ditch, levee or other work constructed by virtue of this chapter."

In the original petition filed by certain land owners in the County Court of Pike County, (which is relied upon by counsel for appellants as one of the grounds of estoppel) they "ask the appointment of commissioners, in accordance with the provisions of said law," (of 1871) "for the purpose of

constructing *a levee*" * * * "and to do and perform any and all acts as provided in said law, for the surveying, laying out and constructing, altering, *repairing, enlarging, protecting and maintaining* said proposed levee," etc. Trans. 445.

The amendment to the bill (Trans. 48-50), filed after the evidence was taken, avers that the act was published in full in numerous newspapers circulated in the levee district, and that meetings of the land owners were held in numerous prominent places in the district at which the act was read and *all* of its provisions explained by C. N. Clark and others, and by which the land owners were fully informed as to all of its provisions.

The testimony of Hon. C. N. Clark shows that he obtained the signatures to the subscription for the preliminary organization referred to in said amendment, and to the petitions for the organization of the district, that he was present at all of said meetings when said signatures were obtained; that said act was read in all its parts; that the portions of the act providing for the repair and perpetual maintenance of the levee were particularly commented on; that it was well known that such a levee as was proposed would be worthless and a mere trap without the means of perpetual maintenance by a system of compulsory assessments; that the supposed law under which they proposed to act provided for such assessments, repairs and maintenance; that neither he nor any of the other parties would have gone into the enterprise except for such provisions, and that such

provisions and understanding were the principal inducement and consideration which led parties to sign said petitions. (Trans. 63-64 and 114-115.)

The same appears in substance from the testimony of numerous other witnesses: R. M. Murray, page 121; S. M. Spencer, p. 129; E. Petty, p. 133; A. G. Chamberlain, p. 149; W. H. Gay, 153 and 277; J. G. Adams, 238; Hon. Scott Wike, 338-9, et al.

III.—There were no representations made to Mr. Palms by any of the defendants or by any one representing the levee district, which induced him to buy the bonds. The prospectus referred to in the bill relating to the bonds was not published by the commissioners or by their authority, nor by any of the defendants, but by the contractors who received the bonds for their work and had them to sell. Geo. W. Jones' testimony, p. 249; Hon. C. N. Clark, p.....

Mr. Palms sent his own attorney, Col. Atkinson, from Detroit to Illinois to investigate the validity of the bonds. He also obtained the opinion of Judge Trumbull and Hon. G. V. N. Lothrop, and perhaps others, and purchased the bonds relying on the opinions of his own legal counsel, and from parties representing the contractors. See testimony of complainant O'Brien, pp. 371-2.

The opinion of Col. Atkinson appears at pages 454-8 of Trans.; that of Mr. Lothrop at page 458; that of Leonard

Swett 387-389. The opinion of Judge Trumbull does not appear in the printed transcript though offered in evidence by defendants.

The opinion of Col. Atkinson, though addressed to John Heffron, Esq., (the party from whom Mr. Palms bought his bonds), was obtained by Mr. Palms as stated above. (Trans. 371-2.) After a detailed review of the law of 1871 and of the steps leading to the issue of the bonds, he said: "I am of opinion that the bonds are valid," p. 458. Col. Lothrop said: "I fully concur in the foregoing opinion of Col. Atkinson," p. 458. In Col. Atkinson's opinion, after stating that the commissioner had filed the assessment roll and asked for its confirmation, he adds: "Two appeals were taken, as appears by the files, *and are undetermined.*" (Trans. 457.) These are doubtless the appeals of Webster and others. See testimony of Hon. G. W. Jones, p. 82, *et seq.* of Trans. It thus appears that Mr. Palms had notice that the validity of the assessments was questioned, before he purchased the bonds, and that he relied on the opinion of his own counsel.

It is alleged in general terms in the bill that Mr. Palms relied, not only on the validity of the bonds issued under statutory authority, but also on the action and consent of the land owners. We suppose the last statement is made for the purpose of establishing the proposition that Mr. Palms intended to provide two strings to his bow, and had in mind his counsel's theory of estoppel in case the statute should fail. We assert that he relied upon the law and

nothing but the law. This is shown by the opinions of his counsel (which appear in evidence). The learned counsel rendering those opinions do not discuss in a single line the effect of a consent of the land owners, or the doctrine of estoppel, nor do they indicate that such a question was ever submitted to them. There is no proof whatever in the record to sustain the allegation that he relied on anything but the law, and to that extent at least the evidence does not sustain the bill. One of the allegations of the original bill filed by Palms himself is as follows: "Your orator, then and there, relying upon the act of the General Assembly aforesaid, and the proceedings of said County Court and said commissioners, and having full confidence in the integrity and sense of justice of said owners and occupants of the said lands so benefitted and reclaimed by said levee and other works, bought *at par* 162 of said bonds," etc. (Trans. 422.) In his statement as to the second purchase of bonds, (Trans. 425), he says: "And your orator then, as before, relying upon the *legal authority* of said commissioners and the assessments made upon said lands *under said act*, and upon the honesty of the owners and occupants of said lands," etc., purchased the second issue of bonds at par, etc. This original bill, filed when his counsel might consult with Mr. Palms in person, contains no averment of any facts on which an estoppel *in pais* could be based. Now an allegation is made by his executors that he relied on certain acts of the land owners as creating a liability against them by estoppel. We may further remark that the allegation that

he bought from the commissioners at par is absolutely disproved, for he bought of the contractors, or their representatives, and did not pay par, but at most 90 cents on the dollar.

O'Brien, Trans. p. 371-372.
Clark, Trans. p.

IV. The averments in complainants' bill to the effect that a protective levee was built with the money furnished by Francis Palms and other purchasers of bonds, and that the average price of lands in the district was increased from an average of 50 cents per acre to an average of $25.00 per acre by virtue of such work, are not sustained by the evidence. It is established by an overwhelming mass of testimony that the levee as constructed was never protective, was a mere trap, and that it broke during the first high water to which it was subjected. See testimony of G. W. Jones, page 91; C. N. Clark, pages 115-116; E. J. Chamberlain, pages 227-236; Hon. Scott Wike, page 335; Wm. H. Gay, pages 277-8; H. P. Dodge, 238-242; J. W. Brammel, 131; J. H. Brammel, 313, and many others.

It is further shown by the evidence above referred to that the contractors wholly failed to comply with the terms of their contract in the construction of the levee in the following particulars:

(1) They left in many places large logs in the line of the levee, entirely covering them with earth. (2) They failed for a large portion of the levee to plow the ground

before the embankment was placed upon it. (3) In many places large stumps were left standing in the levee and covered with earth. (4) In several localities earth was taken from the land side instead of the river side of the levee. (5) The muck ditch provided for in the specifications, was omitted throughout the greater portion of the levee. All of these defects were sources of weakness and they accounted for many of the more serious breaks which occurred in the levee. See all testimony of S. M. Little, transcript 202-204; Col. E. Prince, 138. The averments of the bill as to the matters referred to in this section of the statement are clearly disproved by the testimony.

V. After the break in the levee in 1876 the lands in the district were not worth more than they were before the levee was constructed, and not so much with expense and improvements added. See testimony of C. N. Clark, pages 119-121; Wm. H. Gay, p. 154; Esq. Fesler, p. 169 and 171; Ferguson, p. 183; H. Brown, p. 163; J. H. Dickason, p. 146; A. G. Chamberlain, 150.

The owners of land in the levee district had their fences, improvements, and often their houses, washed away year after year, and all their crops were destroyed. Their losses greatly exceeded the value of the land, and were many times greater than those sustained by the bondholders.

See testimony of Hon. M. D. Massie, p. 205; H. B. Atkinson, p. 261; J. H. Brammel, p. 319; Hon. Scott Wike, p. 336; Hon. A. C. Matthews, p. 332; Harrison Brown, p. 164; W. H. Gay, 157-8; Hon. C. N. Clark, 116, 246; C. W. Reed, 295; Col. E. M. Prince, p. 141, and many others.

VI. After the levee broke in 1876, and the law under which it was built was, about the same time, declared unconstitutional, the district went back almost to the condition it was in before the enterprise started; lands were unsalable at any price; tenants left, farms which had been opened were abandoned, and the land owners were forced to take some action to save their investments, or a part of them. They then, or a part of them, repaired the breaks in the levee by voluntary labor or subscriptions, and in 1877 less than one-third of the lands were embraced in the trust deeds above referred to, embracing not exceeding 30,000 acres out of 110,000, for the purpose of repairing the levee. See testimony of W. H Gay, 156-8; Hon. Scott Wike, 338, and many others.

Meanwhile, the bondholders did nothing to assist the stricken people, or to aid in repairing the levee. The land owners were left to struggle with their burden alone.

After making all the repairs of which they were capable, in 1876-8, cultivation was resumed as far as possible. Again the levee broke in 1880, in the month of June, carrying away the wheat in the shocks. Again it broke in the spring of 1881. After the water had receded, corn was planted, which

was destroyed by another break in the fall of 1881. Assessments as heavy as the people could possibly pay were imposed, and the money spent in repairs, but the levee again broke in 1888. See testimony of Hon. C. N. Clark, 116-119, E. J. Chamberlain, 221-223, and others.

In 1880, after the amendment to the constitution of Illinois was adopted (Con. of 1870, as amended, Art. 4, Sec. 31; 1 Starr & Cur. Stat. p. 122,) the present Sny Island Levee Drainage District was organized. This amendment appears on page —— of the brief for appellants.

Prior to December, 1893, when the testimony was concluded, private individuals and the new organization had spent about $450,000.00 in repairs to the old levee, and relocation and building of parts of the new levee, and the United States Government had spent about $50,000.00 in the same work. (Trans. pp. 224-225.)

The total length of the original levee was 52.4 miles. There is now a total of 3.32 miles of the levee in an entirely new location, purchased by the new drainage district, and the United States Government purchased the new right-of-way for the work done by it. The three railroads heretofore named furnished about three miles of the embankment used as a part of the levee system, but it belongs to the said railroads (Trans. pp. 224 and 77.)

Since the above testimony was taken, we may, perhaps, add, a considerable amount of additional work has been done in the way of strengthening and repairing, especially the

lower end of the levee, amounting probably to a cost of not less than $200,000.00. The amount of material which has been used in filling the breaks and strengthening the old levee, is more than that contained in the original levee. (Trans. p. 226.)

VII. We desire further to call the attention of the court to the fact that this transcript shows that the original levee commissioners and the landowners represented by counsel filing this brief, did not resist the enforcement of the act of 1871; but on the contrary, said commissioners employed eminent counsel, including ex-Senator Palmer, to sustain the validity of the act, and even applied for a rehearing in the case when it had been decided adversely by the Supreme Court. It was resisted by comparatively few persons, including Mr. Webster and others, who resided chiefly in the lower end of the district and who have always maintained that their lands were not benefitted by the construction of the levee, owing to the fact that they were overflowed by back water coming around the lower end of the levee, and by water from creeks, etc., and who have always and consistently opposed the scheme and the assessments. So far as our clients are concerned, they were left without the assistance promised by the act of 1871, without any fault of theirs; and a few of those we represent were among the number opposed to the scheme from its inception. We understand counsel for petitioners to concede in his brief that those who thus opposed the undertaking, and those who did not participate in the alleged acts of estoppel, are not estopped to question the validity of the act of 1871. (See brief for petitioner, p—.)

VIII. We would further call the attention of the Court to a large amount of testimony appearing in the transcript, to the effect that persons owning land throughout the district, and parties purchasing lands, learned of the decision of the Supreme Court of Illinois in the Webster case, and relied upon it as a rule of law and property. See testimony of Hon. Scott Wike, p. 358; Hon. A. C. Matthews, p. 334; A. D. Galloway, p. 292; T. W. Rodhouse, 340; A. J. Lovell, 293-4, and very many others.

IX. It is averred in the bill that Francis Palms purchased the bonds involved in this case of the levee commissioners, and paid for them at par. The facts are that the commissioners entered into a contract with the firm of Skelsy, Fuller & Pierce to construct the entire levee; that it was entirely constructed under that contract, by said contractors, and by their bondsmen who took charge of the work after their failure; but always under the terms of the same contract (Trans. p. 80), which appears in the transcript at pages 366-7. The bonds were not issued to the contractors until after the separate sections of the work were completed, and were then paid out on estimates of the engineer, less ten per cent. of the estimates, and were taken by the contractors in payment for the work at 90 cents on their face value, as shown by said contract. See also testimony of G. W. Jones, page 81.

It further appears that Mr. Palms bought the bonds of or through one John Heffron, who was one of the bondsmen of the contractors (Trans. p. 372), and who was in no way

connected with the levee commissioners; and that he bought them at a price not exceeding ninety cents of their face value.

X The Webster case referred to in this brief is not reported, but a certified copy of the order of the court appears in the transcript at page 459, from which it will be seen that the Supreme Court based its decision in that case upon an opinion previously rendered at the same term of Court in the case of *Updike vs. Wright, 81 Ill. 49.*

The Webster case involved an appeal from the order of the County Court of Pike County, as to some of the assessments involved in this case, to the Circuit Court of said county, (in both of which the assessments were sustained), and thence to the Supreme Court, and the case directly involved the constitutionality of the act of April 24, 1871.

XI. We wish further to call attention to the fact that the last order taken under the original bill filed by Francis Palms was on July 7, 1880 (Trans. page 438); that he did not die until November 24, 1886, and attended to his own business up to the day before his death. (Trans. p. 373) The present bill was filed by the executors of said Palms, April 22, 1889, and contains no averment explaining or excusing the delay. The testimony shows that very many of the defendants never heard of the proceedings in the Palms case prior to the summons under the supplemental bill and that those who had heard of it understood or supposed that it had been abandoned many years ago.

It will be observed that in this statement, and in the argument which follows, the petitioners are sometimes referred to as appellants or complainants, and that the respondents are also referred to as appellees or defendants.

We think it proper to state that the brief for petitioners filed in this Court, did not reach us until our own brief was necessarily in type, except that we had a "proof" copy of a part of the "statement" of said brief. We have, therefore, in our brief referred in some instances to the positions taken by counsel for petitioner in the Circuit Court of Appeals and in the petition for a writ of certiorari filed in this court.

# ARGUMENT.

## II.

## THE ACT OF APRIL 24, 1871, WAS UNCONSTITUTIONAL AND ALL PROCEEDINGS UNDER IT ARE VOID.

The legal question which naturally confronts us at the threshold of this case is that involving the constitutionality of the Act of April 24, 1871, and the validity or invalidity of all proceedings thereunder. The bill admits that the act was held to be invalid, in part, by the decision of the Supreme Court of Illinois, and seeks to place the case for petitioners (complainants below) on the ground of estoppel. It seems clear that if the proceedings under which the bonds were issued and delivered to the contractors in payment for work were legally binding, then the remedy is at law and a court of equity has no jurisdiction; and that, therefore, complainants would have no standing in this court.

If, on the other hand, the power was not conferred by the constitution of Illinois upon the Legislature to enact the so-called law, then the Legislature could not give the County Court of Pike County authority to entertain the petition and order the issue of the bonds, and said orders and all acts the several

parties performed under them were and are absolutely void, and a court of chancery can afford no relief.

*Hein vs. Levee Commissioners. 19 Wal. 655.*
*Rees vs. Watertown, 19 Wal. 107.*
*Merriweather vs. Garret, 102 U. S. 472.*
*Hodges vs. Dixon, 150 U. S. 192.*
*Ottawa vs. Carey, 108 U. S. 110 (123).*

In the view that we take of the case the law was held unconstitutional by the Supreme Court of Illinois in the case of *Webster vs. The People*, not reported, on principle declared in *Updike vs. Wright, 81 Ill. 49*, the former being a direct appeal from the decision of the Circuit Court of Pike County, involving certain of the assessments now under consideration.

But counsel for petitioners in the court below insisted that the Federal Courts are not bound by those decisions, and may, if so inclined, hold the act of 1871 constitutional; and that said act is constitutional.

We will, therefore, briefly consider that question, although at the time of writing this brief we have not received the brief of counsel for petitioners in this court.

We respectfully submit that this is one of the class of cases affecting real estate and involving the construction of the statutes and constitution of a State, in which the courts of the United States will follow the decisions of the highest court of the State.

In *Elmwood vs. Marcy, 92 U. S. 289*, it is said, on page 294, "We have always followed the highest court of the State in its construction of its own constitution and laws."

To the same effect are:

*Fairfield vs. Gallatin Co., 100 U. S. 47.*

*Post vs. Supervisors, 105 U. S. 667 (669),*

and numerous other cases which might be cited.

Assuming that the question is open for decision by this Court, as though it were an original one, we will present as briefly as may be the grounds for holding the act of 1871 and all proceedings thereunder void.

The principles finally established by the case of *Updike vs. Wright, supra*, as we understand them, are as follows:

First—That the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the provisions of the statute of April 24, 1871, and such proceeding is therefore without authority of enabling law.

Second—That Article 4, Section 31, of the constitution of 1870 (prior to its amendment, adopted in 1878) which is as follows: "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others," does not authorize the construction of a levee independent of drainage.

Third—That section 9, Article 9 of the constitution of 1870, authorizing the General Assembly to vest the corporate authority of cities, towns and villages with the power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, is a limitation of the power of the Legislature, and the General Assembly could only vest such power to make local improvements by special assessments or special taxation upon the municipalities therein named, and had no power to confer such authority upon any other bodies.

Fourth—The burden of taxation by special assessments cannot be imposed upon a locality without the consent of the taxpayers to be affected. The owners of such lands must have the right of election in the matter.

As to the first and second of the above propositions but little need be said further than to call attention to the language of the constitution and statute on the subject. The constitution refers only to drains and ditches; the statute refers to the same, and adds that if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed the petition shall so state and set forth a general description of the same as proposed, etc. (Trans. p. 394.)

The prayer of the original petition addressed to the Pike County Court was for the appointment of commissioners "in accordance with the provisions of the said law, for the purpose of constructing a levee on the Mississippi river," etc. While drains, ditches and levees are referred to in the body of the petition there is no prayer for the construction of anything but

a levee (Trans. 445), and the proceedings of the County Court relate only to the construction of a levee. This brings this case directly within the decision in the Updike case, and shows that the levee was constructed not only without constitutional sanction, but even "without authority of enabling law."

It is said in the brief for appellants (p. —) that, "In the Webster case the levee was in connection with a system of drainage." This statement is clearly an inadvertance, and is not sustained by the evidence. See petition to County Court of Pike County, Trans. p. 445.

We have shown above that the original petition prayed only for the construction and maintenance of a levee. Nothing else is referred to in any of the proceedings. The testimony shows that the various outlets for drainage into the Mississippi river, existing before the construction of the levee, including the mouth or outlet of Sny Carte, were cut off by the building of the levee, and that no substituted drainage was provided. This was one of the most serious grounds of complaint by many land owners, especially in the lower part of the district. See testimony of A. Roy, p. 195; Wm. Lovett, 196-7; F. L. Zerenberg, 77; A. L. Galloway, p. 191; J. W. Brammel, 132; C. N. Clark, 61.

The decision of the Webster case (Trans. 459), stating that it is based on the questions raised and discussed in the Updike case, and that "for the reasons there given the judgment in this case will be reversed," etc., is conclusive of this question.

As to the third of the above propositions, Section 9, Article 9 of the constitution of 1870, reads as follows: "The Gen-

eral Assembly may vest the corporate authorities of cites, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes the municipal corporation may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This clause of the constitution had not been construed by the Supreme Court of the State prior to the act of 1871, but a somewhat similar provision in the constitution of 1848 (Sec. 5, Art. 9) had been construed in several cases. That provision is as follows: "The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." It will be observed that counties, townships, and school districts which were included in the above provision are omitted from the corresponding clause in the constitution of 1870; otherwise the provisions are substantially the same, and the decisions of the Supreme Court under the constitution of 1848 become applicable in the construction of the constitution of 1870.

In *Harward vs. Sinclair Drainage Co., 51 Ill. 130 (135)*, decided in 1869, it was held that the power of taxation could not be granted to private persons or private corporations, and that the Drainage Company involved in that case was a private corporation (page 133), although vested with general corporate powers and declared by the act to be a body corporate with

perpetual succession, etc. It may be observed that the act of April 24, 1871, does not provide that the drainage districts to be organized under it should be bodies corporate, and does not give the commissioners thereof as general powers as those involved in the above case.

In *Hessler vs. Drainage Commissioners, 53 Ill. 105 (112)*, decided in 1870, it is said, "Under our constitution, the right of taxation in no form can be granted by the General Assembly to private persons or to private corporations. In this case "the drainage commissioners," organized under an act of February 15, 1855, expressly creating a corporation with full power of succession, etc., were held to be a private corporation and not a body upon which the Legislature could confer the power of taxation.

In *Lovington vs. Wider, 53 Ill., 302*, decided in 1870, the decision of the Harvard case is approved, and it was held that the police commissioners of East St. Louis were not such corporate authorities, and the provisions of such statute were held void.

In the case of *Wider vs. The City of East St. Louis, 55 Ill., 133*, (decided in 1870), the Supreme Court sustained its decision in the Lovington case. Other decisions upon kindred questions are—

*Decker vs. Hughes, 68 Ill., 44.*

*The People ex rel. vs. The Mayor of Chicago, 51 Ill., 17 (30).*

*The People ex rel. vs. Solomon, 51 Ill., 37.*

*East St. Louis vs. Wilts, 59 Ill., 156.*

*Trustees, etc. vs. The People, 63 Ill., 299.*
*People vs. McAdam, 82 Ill., 356.*

In *Madison County vs. The People, 58 Ill., 456*, decided at the January term, 1871, of the Supreme Court, in considering an act authorizing a district within a county to issue railroad aid bonds, the same to be issued by commissioners appointed for that purpose, a majority of the legal voters having voted in favor of the issue, it was held, (pages 462-3):

First—That the bonds were not valid as a debt of the county, to be paid by taxation upon the property in the strip of territory in question, because it was not uniform in respect to the persons and property of the county.

Secondly—Because the territory in question was not a body corporate; and,

Thirdly—"That Section 5, Article 9, in the constitution of 1848, is a limitation on the taxing power of the state. It only authorizes the legislature to permit a municipal corporation to impose a tax," * * * that "The legislature could not authorize its citizens to create the debt."

The Supreme Court of the United States has repeatedly followed the above construction of the constitution. In *Township of Elmwood vs. Marcy, 92 U. S., 289*, the court commented upon several cases above cited, and among other things said, "The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the Supreme Court of Illinois," (Page 293), and held the railroad bonds in question void.

In the case of *Livingston vs. Darlington, 101 U. S., 407,* the court commented favorably upon the Harvard case, and said, "That Section 5, Article 9 of the constitution of 1848 was not, therefore, intended as a grant of such power, or to remove doubts as to its existence, but to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; that, consequently, the legislature could not constitutionally confer the power upon any other than the corporate authorities of the county, township, school district, cities, towns and villages, or for any other than corporate purposes;" and, it is said, (bottom of page 410), that prior to July 15, 1869, this seems to have been settled by the Supreme Court of Illinois.

In the decision in *Harter vs. Kernochan, 103 U. S., 562 (570),* it is said: "It is the settled law of the state (Illinois), as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns and villages, or for other than corporate purposes."

To the same effect is the decision in *Wightman vs. Clark, 103 U. S. 256.*

It will thus be seen that the Supreme Court of this State and of the United States have settled the construction of Section 5, Article 9 of the constitution of 1848, and that these de-

cisions reach back to a date prior to the enactment of the law of 1871. As the provision in the constitution of 1870 is so nearly identical, there can be no question that these decisions properly apply to this case, and that in the Updike case the Supreme Court has merely applied the same line of authority and reasoning to the provisions of the constitution of 1870.

It will, therefore, seem that the Court must come to the conclusion that the entire act of April 24, 1871, and the action of the County Court of Pike County thereunder, including the assessments and bonds in question, were absolutely unconstitutional and void, quite irrespective of any question as to whether the United States Courts will accept the decisions of the State Courts as binding upon them or not.

As the fourth proposition above suggested we would call the attention of the Court to the first section of the act of 1871 (Trans. 394) in which it was provided that "Whenever one or more owners *or occupants* of land shall desire to construct a drain, etc., across the land of others," he may file a petition in the County Court, etc.; that no provision is made for an election for an expression of the wishes of the land owners and no personal notice is required of the proceedings in the County Court.

In the Updike case it is said (page 54): "The clause of the constitution we have been considering, like that of the constitution of 1848, must be understood in the light of the decisions of this Court as forbidding the General Assembly from imposing a burden of taxation upon any locality, without the consent of the citizens affected." And, again, on page 55, "Any

intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the Legislature. Any laws not permitting an election as to the propriety of undertaking the work are vicious and within the inhibition of the constitution." This principle was recognized in *People vs. Solomon, 51 Ill. 37*, and in other cases above referred to.

The Supreme Court of Illinois has always decided that the power to order or impose any tax or assessment, general or special, could only be conferred on some Court or official in the election of whom the people to be affected were entitled to vote. The power under the act of 1871 of ordering the construction of the levee was conferred on the County Court of Pike County, while the levee itself extended northward into Adams County and southward into Calhoun County. The people of the district resident in either of the last two counties had no power to vote for or against any person who was a candidate for County Judge of Pike County. So, that if the act should prevail, it must do so in spite of the fact that a very large portion of the people affected could have no representation in the election or appointment of the Court assuming jurisdiction over their lands. This of itself would be fatal to the supposed statute.

The Circuit Court of Appeals, in passing upon this question, held that as the act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the complainants were issued, it was the province and duty of the court to exercise an independent judgment as to the Act in question under the constitution of Illinois (Trans. 542), and

the court, after such independent investigation, came to the conclusion that the act of 1871 was repugnant to the constitution of Illinois; that the bonds issued under it were void, and that the lands intended to be benefitted could not be specially assessed by any action taken in conformity with the provisions of that Act. (Trans. 551.)

## III.

## CAN THIS COURT COLLECT ASSESSMENTS AS PRAYED IN THE BILL?

We now pass to another and quite important branch of the case. Let us admit, for all the purposes of the argument, that the defendants did consent to the act of 1871, and did thereby render such law valid in all particulars, except that conceded by the bill, namely, the provision empowering and requiring ministerial officers to collect the assessments. Let us also, for the purpose of the argument, concede that the defendants were bound to bear the burdens imposed by the law, without regard to the receipt or non-receipt of the benefits thereof, there still remains the very important question, what has a court of equity of the United States to do with the matter? Granting that complainants' bonds are, as to the defendants, valid obligations, and that there has been a failure of the machinery of the law for the collection of assessments to discharge such bonds, will a court of equity assume the functions of a tax collector? We submit that the court has no power to do so.

AS TO THE JURISDICTION OF THE COURT.

On what ground is the jurisdiction of the Federal courts sought to be maintained? If the act of 1871 be binding upon the defendants in all its parts, there is no need to invoke the aid of equity. The act itself, and the registration law passed at the next session of the legislature, provide all the necessary machinery, through the agency of the public officers. If the law failed as to any of its provisions for the assessment or collection of taxes (using the term in its general sense), then will equity, for that reason, take jurisdiction? In other words, will the absence of any and all other effective remedies render it incumbent on the court to act, or invest it with power so to do?

We respectfully deny that this court has any authority to collect the Sny assessments. Whether a state court of equity would or could act, is not now the question. We are in a Federal court, and considering its duties and functions only. That a Federal court will sometimes compel the collection of a tax, is certainly true. When any court of the United States renders a judgment, and there exists an officer invested with power to collect taxes wherewith to discharge such judgment, and it is the lawful duty of such officer to make such collections, the United States courts will compel the discharge of such duty by writ of *mandamus*. But in the absence of such officer or officers so empowered by state authority, the United States courts will not perform the duties of tax collectors.

In *Wakely vs. The City of Muscatine, 6 Wall. 481*, an attempt was made by proceedings in chancery, to compel the city of Muscatine to collect a tax wherewith to meet certain

bonds. The validity of the bonds was not questioned, but the court held that the remedy was at law, by writ of *mandamus*.

Indeed, it seems that the purpose of the bill was to obtain a *mandamus* in equity.

In *Supervisors vs. Rogers, 7 Wall. 175*, the proceeding was by *mandamus*, and the main question was whether the United States court, sitting in Illinois, but hearing a cause arising in Iowa, and transferred from that state under the act of congress of February 28, 1839, could exercise the power granted by the statute of Iowa relating to proceedings by *mandamus*. It seems that the statute of Iowa empowered courts issuing writs of *mandamus* to appoint any person or persons to do the act ordered to be done. It was held that in such a case the court was invested with full authority to appoint a proper person to levy and collect taxes, the enforcement of which was within the power of the court, but which would otherwise fail because of the refusal of the proper officer to perform the duty.

So far as we know, this is the only case in which the United States court ever ordered the collection of taxes by any person not authorized and required by the state law to make such collection. That proceeding, however, was by *mandamus*, not by bill in equity.

From the day on which that decision was rendered to the present time, the Supreme Court of the United States has been careful to point out again and again that this ruling was based on the express terms of an Iowa statute, and but for that stat-

ute could never have been made. Such is the distinct declaration of the court in *Rees vs. City of Waterlown, 19 Wall. 107.*

In the case last cited, it appeared that the complainant had obtained judgment at law, and had sought by three different writs of *mandamus* to compel the collection of taxes wherewith to pay said judgments. Being practically without a remedy at law, he proceeded in equity. No doubt all the arguments, based on hardship and necessity, were presented to the court. But it was held that the court was without power in the premises. The court say:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a state in the exercise of this authority, at once so delicate and so important."

To the same effect was *Hume vs. Levee Commissioners, 1st Woods, 246,* approved in *State Tax Case, 92 U. S. 575* Also in *Barkley vs. Levee Commissioners, 93 U. S. 265.*

The leading cases bearing on this certain question are collected and reviewed in *Thompson vs. Allen County, 115 U. S. 550.*

Up to the date of that decision one question seems to have been left undetermined—whether a court of equity would, of

its own authority, appoint a tax collector, and cause taxes to be collected with which to meet municipal indebtedness contracted under a valid law, and while such law remained in full force, and this point was left unsettled in *Merriweather vs. Garrett, 102 U. S. 472.* The court of equity had in every instance refused to make such an appointment, or to empower any officer or person to collect taxes, who was not invested with statutory power so to do; but it was supposed to be still an open question whether such decision applied to the collection of taxes necessary to meet municipal indebtedness, contracted under the authority of law existing at the time of the contract. And it was distinctly held that even in such a case the court had no more power to collect a tax than to levy one, and that a court of equity would not become a tax collecting institution for any purpose.

Thus a long line of decisions is presented directly and repeatedly holding that while the Federal Courts will, in proper cases, compel the collection of taxes or assessments, by officers who are invested with the necessary power, and whose duty it is to exercise such power, yet such courts will not, and absolutely cannot supply authority to persons not so empowered.

It may be said in short, that when the machinery for the collection of taxes is in existence under State authority, the Federal Courts will, in a limited class of instances, compel the agents of the State to set the machinery in motion, but those courts will neither themselves create the machinery, nor invest any person with official power to use the same.

In several of the cases above referred to, the question arose as to the levee bonds, and special assessments to meet the same, and such assessments were regarded as taxes in all respects, for the purpose of such litigation. Complainants' counsel are seeking, by argument and by authority, to establish the proposition that the assessments in question were levied under a law which became valid as to the defendants at least, and that the case simply presents the question whether the court will, in the absence of any other effective remedy, collect such assessment.

To this we reply, that complainants can not ask to be placed in any better position than they would occupy if there were no question whatever as to the constitutionality of the act of 1871. The case is certainly not strengthened by the constitutional defect in the statute under which they claim. Granting, then, that such law is valid in all respects except as to the collection of the assessments, still the court will not and cannot give the relief prayed.

Such is the settled doctrine of the Supreme Court of the United States itself, as declared in *Berkley vs. Levee Commissioners, 93 U. S., p. 264.*

"The remaining prayer, for an order directing the Marshal to assess the tax, is equally inadmissible. It is true, that in the case of *The Supervisors of Lee County vs. Rodgers, 7 Wall. 175*, we held that the Circuit Court acting in that case, after having issued a *mandamus* to the supervisors of the county, commanding them to levy a tax, and they refused to obey the writ, was authorized under the code of Iowa, which provided

for such a proceeding, to issue a writ commanding him to levy and collect the taxes required. But we have never gone beyond this case, which depended on the special law referred to. The Marshal is the executive officer of the court, and can only execute its process; and the court, without some such special authority as that enacted in the Iowa code, cannot enforce its judgment for the recovery of a debt in any other way than by seizing and selling the property of a judgment debtor, or (where imprisonment for debt is authorized) by seizing and detaining his person. Where the debtor is a corporation, it cannot seize the property of its members. This it would do if it should issue a writ to the Marshal commanding him to levy a tax upon the inhabitants of a municipal corporation, or upon their private property. The court has no more authority, in point of law, to seize the property of citizens for the debt of the corporation in which they reside (except in some of the Eastern States, where a different system prevails), than it has to seize the property of another corporation. Its power is to issue a *mandamus* to compel municipal officers to perform their duty of levying a tax, is a distinct power, which extends to all ministerial acts which officers are legally bound and refuse to perform. In the recent case of *Rees vs. The City of Watertown, 19 Wall. 107*, we decided that the court has no general power to commission the Marshal to levy taxes for the purpose of satisfying a judgment, and we refer to that case for a more full explanation of our views on that subject."

"Much reliance is placed by the counsel for the petitioner on the fact that the taxes directed to be imposed by the act of 1858 and 1859, were the first lien and privilege upon the prop-

erty liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout the country; but it is never supposed that the public creditors, to whom the money raised by tax is to be paid, have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed."

There is no distinction in this respect between a tax and a special assessment. A tax is defined by the Statutes of Illinois, Ch. 120, Sec. 292 (Par. 294, of Starr & Curtiss), Sub-Div. 14: "Tax—Taxes.—Any tax, special assessments or costs, interest or penalty imposed upon property." *Blake vs. People, 109 Ill., 504* (525).

We think we have shown that even if the complainants were in equity entitled to the relief prayed for the court is powerless to grant it. The Federal courts cannot invest any person with power to collect a tax. Such collections can only be made by public officers duly empowered by State law, and in this instance the State and local officers had no such power, as the Supreme Court of the State decides.

*Where a lien is given by statute and a legal mode provided for collecting the money payable thereunder, such mode must be pursued and equity has no jurisdiction.*

We have elsewhere contended that when under a contract a certain mode of performance is prescribed and such mode is material to the interests of any of the parties, no other can be

pursued. It is true that a mortgage may be foreclosed in equity, although no judgment has been rendered on the note secured thereby. But this arises from the fact that a legal cause of action, the note, has been embraced in one instrument, and an equitable cause in another instrument; namely, the mortgage. In such a case the parties have agreed to both remedies. Where, however, a lien is given by statute and the same act provides a complete mode of collection, that mode is exclusive of all others.

*People vs. Biggins, 96 Ill., p. 481.*

If, as counsel for appellants contend, the act of 1871 is constitutional as to any person or persons whomsoever, then its enforcement must be by mandamus, whether against one person or one thousand persons. If appellants are invested with a valid statutory lien, their remedy is at law, and at law alone. On the other hand, if they contend that they are entitled to an equitable lien, it must arise by contract, for all liens must originate in a statute or under a contract.

If appellants place themselves upon a contract lien, then they must abide by and perform the contract. The effect of the contract we have discussed elsewhere in this brief.

*Webster vs. People, 87 Ill. 343.*

## IV.

### AS TO FORMER ORDERS OF 1879 AND 1880.

It is apparent from the statements of the bill that counsel for appellant intends to insist that the steps taken in the Circuit Court before the filing of the present bill amount to an adjudication of something.

We deny this, and say that no final decree or judgment was rendered binding on anyone, for the reasons following:

1st. Because the orders entered were too vague, indefinite and uncertain to constitute final adjudication.

2d. Because said proceedings were not binding on any person not a party thereto.

3d. The court in the former proceedings had no jurisdiction over the present defendants.

4th. The former orders, whatever their effect, have lapsed by time, and are no longer in force.

The complainants have been guilty of such delay in filing the so-called supplemental bill, in the nature of a bill of revivor, that they are not now entitled to any relief under the same.

5th. The finding as to amounts due was without prejudice.

No one who inspects the former orders will wonder at the fact that from the 7th day of July, 1880, until the 22d day of April, 1889, a period of about nine years, no step was ever

taken by Francis Palms, or anyone representing his interests, to enforce what is now called a decree in his favor. Had there been a decree definite and final in all its parts, it would have become defunct by the lapse of a period longer than the lives of judgments under the laws of the state. A judgment in this state is a lien only for seven years.

Again, the former proceedings were against the commissioners only—three men, who did not represent the defendants in any way, and who appeared and answered the bill only in their individual capacity. True, after the decision of the Updike case, the owners of about one-third of the lands did convey the same to the three persons who were originally commissioners, as trustees, for the purpose of raising a fund with which to protect the levee from being destroyed. But such trust deed had nothing to do with the assessments in question, nor were said trustees invested with any authority, or required to perform any duty with respect to said assessments or the bonds of the complainants.

We think it perfectly clear that neither Francis Palms, nor his counsel, nor the court ever supposed for one moment that the orders entered were final, or binding on any one other than the commissioners. That complainants' counsel never thought so is evident from the fact that they have brought in the defendants, or as many of them as have been found. Had it been supposed that the former proceedings concluded the defendants and subjected their titles to the assessments in controversy, the present steps would not be taken. It can hardly be said that the presence of the defendants, being deemed nec-

essary, and they being brought into court for the first time, are yet precluded from raising the very questions on which the alleged liability depends. Even if the original orders constituted definite and final decrees, the complainants are of their own motion, opening the same. The very purpose of a bill of review, or a bill in the nature of a bill of review, is to reverse or change the original decree on the ground of newly discovered evidence, or because of manifest and material error apparent on the face thereof. The very object of such a bill is to impeach the decree. (*Story's Eq. Pleadings, 338.*) It seeks for a rehearing. (Note, p. 370; see also p. 403.)

We are not forced to rely on any particular rule applicable to bills of review. The so called *decree* does not purport to be final. It may have been the purpose of the court to bind the lands in the Suy district, pending the litigation, as far as could be done in such a proceeding, for any sum that might ultimately be charged against them. Whatever the purpose was, the orders entered do not resemble final decrees. The court does not find any facts, general or special. There are two orders referred to in the bill of complaint. The first was entered on March 13, 1879. (Trans. 437.) The second was entered July 7, 1880. (Trans. 438.)

By the first order the cause was referred to the Master to ascertain the sums due complainants. It was also ordered that complainants or other persons have liberty to exhibit supplemental bill or bills against present or former owners of said lands, "to compel them to contribute," and to ask for such further relief as complainants be advised they are entitled to.

(Trans. 438.) By the same order the court reserves all other questions of relief to parties. (Trans. 438.)

Now it is perfectly clear that the first order decided nothing, as all material points were reserved.

In the second order, or that of July 7, 1880, the Master, to whom had been referred the question of the amounts due the complainants, having reported, the court overruled certain exceptions of the then defendants to such Master's report. The report was confirmed with the most important qualification, that the amounts found due were "without predjudice." (p. 440).

And again the court permits the complainants, in their own names, or in those of the commissioners, to proceed in this court against the lands and land owners, as they might be advised the same were liable, by bill or bills, supplemental or otherwise, for the recovery of the sums found due as aforesaid, and also for costs.

Now does this mean anything more than permission to proceed against the defendants or their lands, by proper methods, and thereby to test the question of liability? Did the court mean to adjudge the case in the first instance against parties not before it, then bring them in by process, but deny them the right to open the question at issue? Surely not. The truth is, an inspection of the so-called decrees shows that they did not bind any party not before the court for any purpose, and the court never supposed that such persons were bound. The decrees, if they can be so termed, are purely provisional. They do not attempt to distribute the indebtedness

found due, nor to make any provision for collecting assessments, or for subjecting the lands to sale.

All lawyers who are familiar with practice in the Supreme Court of the United States, are aware that the court strenuously insists on the rule that nothing but a final judgment or decree will justify an appeal or writ of error. No defendant can be bound finally by a judgment not final, nor can any order be so regarded which does not fix and measure the liability which it declares. Suppose any of the defendants in the former case had appealed, could anyone know the amount adjudged against him, or against his property? Could anyone say that such decree fixed the liability of such defendant at a sum which would entitle him to appeal? There was no finding and no decree as to the amount due the complainants, much less the distribution of any sum so ascertained over the lands of the district. The first order reserved every substantial matter, for future action by the court. The second and last order declared that the finding, as to the sums due the complainants, was without prejudice.

There can be no final or binding decree in any court of equity, which finds any fact necessary to the liability of the defendant with prejudice. We submit that such a thing is not possible. And we submit, further, that from the terms of the orders themselves, it is apparent that the court intended them to be provisional only, and not binding on any person not before the court. The orders simply contemplate that such parties may be brought before the court, and their rights or liabilities determined, and that, in the meantime, any lien created by the

act of 1871 on the assessments, or on the lands, shall be continued so far as the commissioners, the then defendants, were concerned. That was all the court meant. The court gave the complainants leave to litigate the questions with the real parties in interest, and afforded every facility to that end. Complainants were allowed to proceed in their own names, or in the name of the commissioners.

Why should the Court so carefully give this privilege, and provide the means for bringing in the present defendants, if their rights were already adjudged and determined? And why should the complainants invite further litigation to decide that which is already settled? The original bill did not attempt to make defendants of a small number of land owners, as representatives of the whole, in order to test the question of their liability, or the liability of their lands.

In the case of *Fourinquet et al. vs. Perkins, 16 How. 82,* it appeared that the Circuit Court had entered an interlocutory order in favor of complainants, and had directed an account to be taken in accordance with said decree. Upon the report of the Master at a subsequent term, exceptions having been taken to the report, the court reversed its action and dismissed the bill. This action was fully sustained by the United States Supreme Court, and it was held that the previous orders, though on the merits, were open for revision and under the control of the court; and that if the court changed its opinion, it was its duty to correct the error.

WERE DEFENDANTS BOUND BY REPRESENTATION?

That the Levee Commissioners were not trustees for the land owners, to the extent of binding the latter in litigation, may, we think, be assumed. Their duties were merely such as the act of 1871 defined, if that act were valid, and their powers were created and limited in the same way. These functions were statutory, and did not include the representation of all or any of the residents of the district in all such litigation as might arise relating thereto.

There are many instances in which individuals may be represented in litigation by their trustees alone. Wherever parties claim through and under a trust, the trustees may appear for them within the scope of their appointment. Most municipal bonds are made payable to trustees, and show that fact on their face. We may say that all railroad bonds are so drawn, and show on their face, as well as on that of the trust deeds securing them, that they involve a trust. As a general rule they can only be obtained through trustees. It follows, therefore, that parties purchasing such instruments necessarily take them, subject to the trusts, shown by their terms. It may well be that in litigation arising on such evidences of indebtedness, the parties claiming the same shall be bound by the representation of their own trustees within the scope of their trusts.

The commissioners had issued no obligation purporting to bind the defendants personally, nor did they in any such instrument purport to bind the property of the defendants as their representatives.

But if they had done so, their authority would remain the vital question. How far the alleged participation by the defendants in the various proceedings set forth in the bill should bind them or some of them under the trust, and whether such allegations are true or false, were matters open to dispute, which required to be established by proof. And no such issues could be tried or waived without the presence of the parties in interest. The alleged facts which are set up as having the effect of bringing the defendants within the operation of the trust, are matters purely *in pais*, and even if proven, the result thereof was matter of discussion in which the defendants had a right to be heard. Nothing the trustees could do or admit would bind the defendants as to the facts which are alleged to have subjected them to the representation of the trustees. Whether such facts existed at all, and if so, whether they did in law, subject the defendants to the representation of the trustees, were jurisdictional matters which must have been established before any single defendant could be bound by anything done by or any decree rendered against the trustees.

Trustees may, within the scope of their authority, and no further, represent those who select and claim under them, but as to the fact of such claim or selection, they have no representative authority whatever.

The jurisdictional fact must be established before the right of representation arises, and when the alleged facts consist of sundry and various proceedings *in pais*, open to dispute as to their truth, and to discussion as to the results, the parties interested have a right to be heard before anything whatever is adjudged against them.

We have, for mere convenience, spoken of the defendants in the original cause, as *trustees*. Under the act of 1871, they were not trustees for any natural person whatever. They were merely commissioners, empowered to build the proposed levee, and issue bonds on behalf of the Sny district, in the aggregate, as a *quasi* corporation. Years afterwards they were made trustees under a trust deed, executed by less than one-third of the original defendants for the purpose of raising money with which to prevent the levee from being washed away. Even that trust deed was not made on behalf of the holders of the Sny bonds, nor did they have any interest therein.

It is now contended that the commissioners were, by some process of reasoning, or of construction, and as the result of acts of the present defendants, invested with a trust on behalf of, and therefore entitled to represent the latter. No deed or other instrument declared such trust, or gave such power.

As we understand the rule, no person can be bound by the representation of of any trustee or other agent, where the effect or validity of the act on which the right of representation depends is itself a matter of dispute.

Generally speaking, an assignee may sue in equity to enforce the interest or claim assigned, without making the assignors parties. Yet Mr. Story says: "But when the assignment is not absolute, or unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, then he is not only a proper but a necessary party."

*Story's Equity Pleadings, par. 153.*

It may be remarked that not only were the commissioners totally unauthorized to represent the individual land owners, but they were in fact, either absolutely adverse thereto or capable of becoming so. Under the terms of the act of 1871, it was their duty to enforce the collection of assessments in the interests of parties entitled thereto. In the event of their taking such action they would represent the bondholders as *quasi* creditors, and could not at the same time represent the land owners, who were *quasi* debtors.

Returning to the character of the original bill in this case, we are aware that on the hearing below, counsel for appellant insisted that the bill was not one of review, but one of revivor. We fail to comprehend how this fact could aid them, in view of the positions which they are now assuming. The filing of the bill of revivor admits that they are dead. A living order needs no resurrection. The act of filing a bill of revivor is in itself an explicit admission that the thing to be revived is *functus officio*. All this will appear more relevant hereafter, when considered with reference to the defense of *laches*.

We do not think it important to discuss this question further, first, because the former orders were merely interlocutory; and second, because they show on the face thereof that the court intended that all persons not then before it, and whom complainants desire to bind and conclude, should be brought in and fully heard.

## V.

## EFFECT OF OVERRULING DEMURRER TO BILL.

Counsel for appellants insist that as the court overruled a demurrer to the present bill as originally filed, all the allegations contained therein are now judicially established. Without inquiring whether such a rule ever existed in chancery, it is certain that it does not exist in modern practice. The admissions of a demurrer are only for the purposes of the demurrer, unless the party filing the same elect to stand thereby, and in that event the judgment becomes final. It would indeed be strange if counsel for appellants should be permitted to make up an issue on a full answer to the entire case made by the bill, take testimony on all issues for two years, and then discover that really the entire case as made by the bill had been determined by the court in overruling the demurrer, and that there was nothing practically left to try. As a matter of fact the court in passing on the demurrer merely held that the case could be better determined on answers. This has been openly declared by Judge Allen, who sat on the argument of the demurrer and on the final hearing.

But all this is quite apparent from the whole record. The court, after overruling the demurrer, gave the defendants leave to answer. They did answer fully as to the whole case and appellants filed replications and a vast amount of evidence was taken. If counsel for appllee intended to insist that every allegation of the bill as originally filed was fully determined by the court in overruling the demurrer, they should have excepted to

all parts of the answer which met the averments of the bill. Then the court would have been required to say whether such was its own understanding as to the state of the record and to make any alteration required in its former orders so that the merits of the case might be heard. If there was ever anything in appellant's present objection they waived it by failing to except to the answers and proceeding to take testimony on the issues as made up.

*Marple vs. Scott, 41 Ill. 50.*

But there is one complete answer to the point now made by appellant's counsel. After the demurrer was overruled appellants repeatedly amended their bill. This opens up the entire pleadings. It is a settled rule that filing an amendment or a bill of review opens the whole case and all former decretal orders which are in themselves interlocutory. This has been fully determined both by the State and by the Federal Courts.

*Gibson et al. vs. Reeves, 50 Ill. 406*, and cases cited.
*Marshall vs. Vicksburg, 15, Wallace U. S. 149.*

The corrected certificate of the clerk of the Circuit Court shows that the amendments to the bill were made long after the demurrer was overruled, to-wit, Nov. 5, 1895, and long after most of the evidence in the case was taken. We do not, however, except or object to the evidence on the ground that it was taken before the amendments were made, nor question its application to the case on that ground; but we refer to this fact only to show that the bill was amended in important particulars after the demurrer was overruled.

## VI.

### LIS PENDENS.

It is contended on behalf of petitioners that all the defendants had notice of complainants' supposed rights either by the filing of the original petition for the construction of the levee or by the filing of the original bill herein on May 4, 1878. Those petitions and the said bill are now alleged to have given constructive notice to every one—subsequent purchasers, mortgagees, heirs and all persons whomsoever, whether such persons ever heard of any of the proceedings or not. And this result is claimed to have arisen whether the statute of 1871 was constitutional or otherwise. We may remark that under the original proceedings by petition in the County Court of Pike County, no process was actually required or served, and under the original bill there were no defendants except the three commissioners, made parties in their official capacity. The first proceeding was not a suit at all, and the statute being unconstitutional, it had no effect as a proceeding on behalf of the state or under its authority. Even if the original bill of 1878 had embraced the parties in interest and been duly followed by the service of process, it could not charge any one under the principle of *lis pendens*.

If the alleged notice grew out of the pending suit under the principle of *lis pendens*, then we squarely deny the application of such principle, as no man can be permitted to begin litigation, let it slumber along for many years, and then claim that while he, the complainant, was thus calmly sleeping, the

property in litigation was practically tied up, and all parties dealing with it did so at their peril. Notice by *lis pendens*, can only be kept alive by the diligent prosecution of the cause.

In *Herrington vs. McCollum, 73 Ill., p. 483*, the Supreme Court of Illinois say:

"The rule is said to be, that, to affect purchasers, there must be a close and continuous prosecution of the suit; the exercise of reasonable diligence, unaccompanied with any gross slips or irregularities, by which injuries could accrue to the rights of third parties." And many cases are cited in support of the proposition.

In *Durand vs. Lord, 115 Ill., p. 621*, the same court lays down the true and reasonable rule applicable to notice by *lis pendens*. Complainants in equity, who desire that a pending bill shall have the effect of giving notice to third parties, must not be guilty of such delay as to justify the conclusion that they have abandoned their cause.

It is not sufficient to convey notice by *lis pendens* to file a bill in court against persons who do not own the title to the property to be affected. The general principles applicable to this subject have been recently laid down by a decision of the Supreme Court of this state, as follows:

1. The property involved must be of a kind subject to the rule.

2. The court must have jurisdiction both of *persons and of the res*.

3. The *res* or property involved must be sufficiently described in the pleadings.

*Norris vs. Ile, 152 Ill., 202.*

*Bennett on Lis Pendens, p. 153.*

It is essential to a *lis pendens* that the claimant of the *res* should be impleaded, and the *lis pendens* begins where a bill is filed from the service of summons, and not before. *Allison vs. Drake, 145 Ill., 500, (516).* If he is not before the court the *res* is not bound. The rule *lis pendens* only binds claimants to the property who are impleaded, and their *pendente lite* purchasers. If they are not impleaded, they are at liberty to dispose of the *res*, and the purchaser will take it unaffected by the suit, although it may be pending against parties other than the real owners.

*13th Am. & Eng. Enc. of Law, p. 882b,* and authorities cited in Note 2; also p. 902 and Note 4.

*Games vs. Stiles, 14th P., 322.*

In *Miller vs. Sherry, 2 Wall. 237 (250),* it is said:

"The principle applies only to those who acquire an interest from a defendant *pendente lite.*"

*Grant vs. Bennett, 96 Ill., 513 (521).*

*Hallom vs Trum, 125 Ill., 247.*

*Franklin Savings Bank vs. Taylor, 131 Ill., 376.*

In *Story's Eq. Jur., Sec. 406,* it is said:

"But he who purchases during the pendency of a suit, is bound by the decree which may be made *against the person from whom he derives title.*"

We insist, then, that even the original suit has lapsed as to the parties thereto, and that it was not notice to purchasers. As to the present defendants, the present suit is a new one, and in so far as it constitutes *lis pendens* the notice begins with the filing of the supplemental bill. The principal grounds of equity averred in this bill were not contained in the original suit. It makes substantially a new case, as well as brings in new parties. Where a bill originally so defective as not to create a *lis pendens* is subsequently cured by amendment, *lis pendens* will commence from the time of filing the amendment, where the defendant has been served with process.

*Norris vs. Ile, 152 Ill., 202.*

So it is with an amendment that sets up a new equity.

*13 Am. & Eng. Enc. of Law, p. 886,* and cases in note.

The case of *Miller vs. Sherry, 2 Wall. 250, 251,* fully sustains the above authorities upon both of the questions presented.

*Clarkson et al. vs. Morgan, 6 B. Mon., 441.*

In this case the complainants took no step whatever for nine years. As against third parties, the force of even a final decree would have been lost in that time. Yet they insist that during all these years every man dealing with land in the Sny District had notice under the *lis pendens.* We are not now

contending with reference to the application of the Statutes of Limitations as to the original land owners, but we do contend that complainants can found no equity on the original proceedings, either in the way of charging third parties with notice, or under the doctrine of *res adjudicata.*

So far from the defendants being bound by notice, we maintain that if the complainants ever had any equity they have long since lost it. The defense of *laches* and limitations will be considered in a subsequent part of this brief.

## VII.

### THEORIES OF COMPLAINANTS' BILL.

The bill filed by complainants originally, and adopted in the amended bill, is founded on two theories. One of them, as we understand it, asserts the proposition that under the decision of the Supreme Court of Illinois, in *Updike vs. Wright, 81 Ill., p. 49,* only that portion of the act of 1871 which relates to the *collection* of assessments was held void, leaving all other parts of the law still valid. The other theory asserts that as to the defendants, the act of 1871 is in full force in all its parts.

If the first theory be sound, all the provisions of the statute in question, which relates to the formation of the district, the proceedings in the County Court and before juries, the assessment of damages and benefits, and the imposition of taxes on lands, are perfectly valid, and nothing has failed but the power to collect taxes lawfully imposed. Therefore the com-

plainants ask this court to confer on the state or local officers or upon some other person or persons the power to make the required collection.

We have seen that if this theory be true, the Federal court has no authority to enforce the collection of taxes or assessments, even for the discharge of a debt adjudged to be due, unless through public agents who derive their authority from the state itself. We have also seen that the Supreme Court has held in *Updike vs. Wright* that the act of 1871 is unconstitutional and that the state officers have no power to make such collection. The regular collecting officers have no authority derived from the state to do the act in question. So says the state Supreme Court. In the absence of such authority, the Federal court can not confer it. So says the Supreme Court of the United States in the cases already referred to. These two propositions cover the whole question as to whether this court can or can not do what complainants ask.

As already stated, the second theory of complainants asserts that *as to the defendants*, or, as to some of them, the act of 1871 is still in force in all its parts, on the ground that they have, by their acts, estopped themselves to dispute the validity of the law, although it has been held void as to others.

Both theories assume that the statute of 1871 may, in whole or in part, be void as to one person and valid as to another.

Now, we know that there are cases in the books in which language is used that might seem to sustain such contention.

And yet it is obviously false. A law cannot operate on one citizen and not upon another at the same time and within the same jurisdiction. Its force does not depend on outside evidence, or on the consent or non-consent of any one. It represents the supreme authority of the state, and from thence it derives its force.

Wherever the courts have used words which would seem to indicate that a statute might be regarded as being in force not because the supreme authority of the state had enacted it, but because some one had chosen to adopt it, they only mean that persons may estop themselves from denying that certain obligations defined in such supposed law have been so far voluntarily assumed that they have become binding on such persons. In other words, that a party may, by his conduct, raise an implied promise to perform certain acts specified in a void law, and in the interests of justice the courts will compel the performance of such promise, the statute furnishing the terms of the contract. This is all that is meant.

This subject is fully treated in the argument of Gen. Harrison, which follows, and the authorities which might be cited will not be considered here.

## VIII.

## THE DOCTRINE OF ESTOPPEL AS APPLICABLE TO THIS CASE.

(By Benjamin Harrison.)

We have already shown, we think, conclusively, that the act of 1871 was wholly invalid as a basis for these proceedings,

first, for unconstitutionality and, second, because it did not relate at all to the construction of levees.

There neither was nor could have been any law authorizing these bonds and assessments. The Supreme Court of Illinois, before the original bill in this case was filed, and in a case involving these identical assessments, had so decided. We have further cited a line of cases in Illinois, ante-dating the alleged contract in this case and establishing the same principles. These decisions related to the construction of the statutes of Illinois, and established a rule that is binding upon the court.

But appellants ask the court to give them separate judgments *in rem* against numerous tracts of land for the amounts of separate tax assessments for the construction of the levee, notwithstanding that the legislature of Illinois had never passed any law authorizing such assessments for the construction of levees, and that the Constitution of Illinois forbade the passage of any such law.

It is claimed that, though the proceedings out of which these assessments and the bonds of appellants came may have been wholly void, *ab initio*, as to the general public, and for reasons that everybody was bound to take notice of, yet by reason of certain things said or done, or not said or done, by the appellees, they cannot say that the law is invalid or unconstitutional and this court, as to them, can and should enforce the assessments precisely as if the law had authorized them and had been a constitutional enactment.

The present bill seeks to collect not only the assessments actually made by the drainage district, but asks to have such further assessments made upon the lands as may be necessary to pay the bonds in full, and to maintain and preserve the security. (Transcript of Record, p. 45.)

And if, by reason of estoppel, the act of 1871 is good law as to the appellees, why may not all of the provisions be put into operation against them? The prayer of the bill goes that far. It asks that by a receiver the further assessments necessary for repairs shall be made. (Transcript, p. 45.) Perhaps this relief is asked upon the theory that the law was as to every one a valid enactment. But if this doctrine of legislation by estoppel is allowed, must not the courts carry the law to its full end, if anything is yet executory? Can the courts cut a void law into halves—and make one-half good?

On our part we insist that an unconstitutional law is absolutely void as to every one, and that it cannot be affirmatively enforced *as a law* by any court against any one. To say otherwise is to say that the courts may make laws, and that free from the limitations which the people have placed upon the legislative power.

The power to declare a law void for unconstitutionality is a very high and delicate judicial power; the power to follow this finding by a decree putting the whole law into operation as to certain persons is, it seems to us, an amazing and dangerous stretch of the judicial power; and the power to make valid half a void law upon a consent that went to the whole law is unsupportable.

It must of course be admitted that not every one can require the court to pass upon the constitutionality of a law, or for that matter upon any other question. The person who invokes a decision must show a personal interest, and bring in a person who controverts it. There must be a real issue joined—a scholastic issue will not serve.

Ordinarily the courts not only allow but enjoin a suitor to tell the truth. This rule is, however, subject to the limitation that he has not before fraudulently or with gross negligence induced or allowed another to believe that the truth was otherwise than he now asserts it to be, to the prejudice of such other person.

This rule, however, is limited to matters of fact, as to which ignorance and reliance upon the representations of another is allowed. But no one is permitted to be ignorant of the law or to rely upon the representation of the man he is dealing with as to the law of the case. In fact only courts of last resort can certainly know what the law is, and the certainty of the courts may in part be dependent upon the fact that what they say is law, thenceforward is—however it may have been before!

In the case at bar there is no pretence that there was any fraudulent representation or suppression on the part of appellees or any of them as to any matter of fact; nor that they or any of them by their conduct induced Palms or any other person to believe that any fact was otherwise than it really was. A "misleading" is an essential element of every estoppel, and that element is wholly absent in the case at bar.

The estoppel sought to be enforced against the appellees relates wholly to a matter of law—and as to that there can be no pretence that Mr. Palms relied upon anything said or done by them. The appellees were not lawyers, but chiefly farmers, and the evidence affirmatively shows that Mr. Palms, before buying the bonds, had the opinion of three eminent Illinois lawyers as to the legality of the proceedings out of which the bonds came. Mr. Palms, so far as appears, never saw or communicated with any of the defendants. He bought his bonds in open market, not from them or any of them, nor from the levee commissioners.

But leaving these facts out of consideration for the moment, the case may be stated thus: Two persons, each in the honest belief that a certain legislative act is unconstitutional and applicable, contract with each other with reference to that law and upon the consideration of the securities, profits and protection which the law gives to them respectively, which in this case were, on the part of the contractor, the profits of construction, and on the part of the bond holders, the annual interest upon the bonds and lien upon the assessments stipulated for; on the part of the land owners, the legal right to assess all those benefited rateably for the construction and maintenance of a levee for the protection of their lands.

The consideration upon which these land owners consented to submit their lands to assessment has failed—wholly failed, as it seems to us—for a green and untried levee is not a defense but a snare, if there be no compulsory provision for its defense and repair.

No levee was ever constructed on the Mississippi river that did not require vigilant and organized watching and compulsory drafts for its defense. No sane man would ever contribute to a levee scheme that did not include adequate compulsory provisions for defense and maintenance.

But if the failure of consideration was only partial—any implied engagement of the land owners was indivisible and the consideration cannot be apportioned. The evidence clearly shows that the losses suffered by the land owners, by reason of the breaking of the levee, greatly exceed the amount of the bonds of appellant.

But the failure of the compulsory process for repair was not all. When the law fell, not only the only practicable method of maintaining it (that by compulsory assessments) failed, but the right of any number of land owners, less than all, to maintain it by voluntary contributions also failed.

Some of the land owners resisted the proceedings from the beginning, and as to them the levee never was a lawful structure. Where it was built across the land of any such protesting land owner no one, after the law failed, could lawfully enter upon the land to repair it. The land owner had a right to cut the levee or to level it to the original surface. As to some whose land lay back from the levee, it is in evidence that the levee by cutting off the natural drainage and pocketing the water, inflicted and increased flooding of their lands. As to these the levee was a nuisance that a court would have restrained —perhaps one that the land owner himself might have abated. Indeed upon what other principle, after the law failed,

could any land owner, no matter what his relation to the proceedings, have derived the right to exclude from his land persons who sought to enter and repair the levee? Is all this to turn upon the proving of facts constituting estoppels *in pais?* Who could set up estoppel? Who could determine whether repairs were needed, or the character of them? The confusion and inadequacy of relief into which any attempt to enforce such a law as this, as to certain persons, would lead, are indescribable.

The allegations of the appellants' bill show that Palms bought his bonds upon the faith that the levee was a lawful structure, and of a compulsory provision for its repair. He alleges that the lands were valueless to him as security, unless the levee was maintained and kept in repair; and that is, of course, to say, that they were valueless to their owners. He, as well as the land owners, looked to those provisions of the law that made the levee a lawful structure and provided for its repair, as essential things. (See Trans. p. 537.)

The proceedings here are for the enforcement by decre and writ of the law of 1871. The court is asked to confirm the jury assessments of benefits, to declare that they created valid liens upon the lands, and that the bonds sued upon are valid bonds, and are a lien upon the assessments. The appellees are not here asking for an injunction or other discretionary writ, or for any affirmative relief whatever. They have been brought in by your writ of summons, and are here to object that this court shall declare a void law to be enforceable against them, and especially that it shall declare a part of a void law—the part

that puts a burden upon them—to be valid, while they lose the compensatory benefits of the other parts of the law.

We insist that it is contrary to equity when two persons have acted in the mistaken belief that a certain law was valid, and the law fails for unconstitutionality, before one of them has received the consideration contemplated by the law, that the other should be allowed to have by court decree the full consideration moving to him, from these several defendants.

THE GENERAL LAW OF ESTOPPEL.

In examining the authorities on the true definition of "estoppel in pais" and the terms and conditions on which relief is granted by virtue of that great principle, one cannot avoid being surprised by the multitude of decided cases and the variety and conflict of the decisions. It is difficult to draw from them all a clear and true rule that will not contravene the opinion of some court. Indeed we think it would be impossible to do so, as extreme confusion undoubtedly exists. For instance, many cases hold in expressed words that no man can be estopped by his words or acts unless an intention to defraud is shown to have existed.

Other cases declare that it is sufficient if negligence exists, whatever the intention may have been. Many decisions turn on the question whether relations of trust and confidence had or had not existed between the parties. All, however, assume that in order to create an estoppel, whether by words, or acts or silence, the party demanding relief must show that he had a right to rely and actually did rely on the assurances given by the other party.

The Supreme Court of Illinois has, somewhat recently, however, stated for us the law of estoppel of that state as applicable to a case where there was a mutual mistake of law.

In *Holcomb et al. vs. Boynton, 151 Ill., pp. 299 and 300,* it is said:

"The case lacks several of the essential elements of an estoppel. In the first place the proof is not clear and convincing that Boynton procured the judgment and redemption, and ordered the sale. And if it be conceded that he did, it does not appear that he acted with a fraudulent purpose, or that Pierce and Dean have lost anything thereby. The entire proceedings in the county and circuit courts were preserved in public records open to inspection. Applying the law, they knew the sale by Charles Kellum was void, and that every step taken after the rendering of the decree was of no effect. How were they deceived? Certainly by no concealment of facts or fraud on the part of Boynton. He may, if regarded as the author of the first redemption, have labored under a mistaken notion of the law and considered the sale as legal. It is a novel idea in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all. As we understand the doctrine of estoppel *in pais*, it is based upon a fraudulent purpose and a result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is invoked has, by words or conduct, caused him to believe in the existence of a certain state of

things and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to an application of the rule, but will be considered as having acted upon his own judgment solely. The essential elements are: Misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting upon the representations.

*Story Equity Jurisprudence, 1534.*
*Davidson vs. Young, 38 Ill., 152.*
*First National Bank of Quincy vs. Ricker, 71 id., 439.*
*Dinert vs. Eilert, 13 Brad. 99.*
*Herman on Estoppel, 969.*"

And the rule of the Federal Courts has been stated with equal emphasis in *South Ottawa vs. Perkins, 94 U. S., 267.* As we shall notice this case again, we only quote a sentence or two here.

The court say:

"There can be no estoppel in the way of ascertaining the existence of a law * * * The doctrine of estoppel is totally inadmissible in the case."

It is the very essence of an estoppel, that the party setting it up has relied, and had the right to rely, upon an assurance given by speech, or silence when speech was called for, or by some act, or failure to act, when action was called for. And as

every person is equally chargeable with knowledge of the law, no man is entitled to rely upon the opinion or representation of another as to what the law is.

Estoppel is a misnomer for the doctrine of some of the cases that when a law is found to be unconstitutional, a party who has received the full benefit of the law may be compelled to pay for it according to the terms of the law.

Such cases can only rest upon an implied contract, the terms of which are to be sought in the invalid law, and it must follow that such an implied contract can only be enforced when the full consideration of it has been received by the party against whom it is to be enforced.

In the cases which we shall now proceed briefly to review, many things have, we think, been inconsiderately said in the way of dicta, but the cases may be placed in two general classes:

First. Writs of injunction have been refused to suitors, seeking to stay the collection of special tax assessments, upon the ground that, as they received *the full benefits contemplated by the law* without protest, and had in some cases affirmatively promoted the work, they ought in equity to meet their implied obligation to pay for the work, and so could not have the writ of injunction.

Second. In others of the cases the courts have used the doctrine of estoppel as the ground upon which tax assessments defectively levied or levied under a void law have been enforced.

This class of cases must go upon the theory of an implied contract, the terms of which are to be sought in the void law.

The case which has moved the courts to strain their powers, as we think, to find a remedy, is this: The land owner has sought and received all the benefits contemplated by the law, and then sets up the invalidity of the law to relieve himself from the assessment.

But when the law breaks down before its essential scheme has been executed; before the contractor has completed his particular work, or so as to take away the legal power to do other things essential to the use of the work done, considerations of equity do not allow, much less require, that one of the parties shall have all the profit and advantages the law contemplated in his behalf and that all the loss shall fall upon the other; that the latter should be held bound to pay for a result that he never did and clearly never would have contracted for.

The court cannot apportion the consideration, for it is single and the contract non-separable; and this is not an action by the contractors to enforce an equitable lien on a structure built by them, but a suit upon bonds that were issued without any authority of law, and to enforce assessments that have no necessary relation to the value of the structure built. The question of a contractor's lien upon the structure is quite another thing, and we have no such case here. That case would proceed upon the invalidity of the law and the failure of its provisions as to assessments, and against those who had appropriated the work—not for a contract price, but for its value at the time of its appropriation.

For ourselves, we utterly reject the doctrine that what the formal action of the supreme legislative body of a state cannot make to be law, can be made to be law by the act of an individual. But we feel sure that no respectable authority can be found where a special tax assessment has been enforced upon the ground of a so-called estoppel, unless the person sought to be estopped had received the full benefit the law would have given him if valid.

THE CASES IN THIS COURT AS TO ESTOPPEL.

In the case of *South Ottawa vs. Perkins, 94 U. S., p. 267*, this court said:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case, and for one party, and not a law in another case and for another party; a law today and not a law tomorrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In this case bonds had been issued under a void law, bought innocently, and the town had paid one installment of interest. The circuit court held the town "estopped" and this court in reversing the judgment used the language we have quoted.

If in the case at bar the action had been against the Sny Levee District as a municipal corporation, upon the bonds, it could not be disputed that the South Ottawa case would compel a decision that there was no estoppel—unless this court should reverse itself. In the case at bar the payment of one or more tax assessments is relied upon as estopping those who paid them to say that the law was unconstitutional; but if the voluntary levying of taxes by South Ottawa to pay interest upon its bonds, and the collection and paying over of the money to the bond holders worked no estoppel to the town, can the payment of the taxes by a citizen of the town under threat of process estop him?

Or did his liability to pay any tax the town had assessed, to pay the bonds, depend upon the question whether he had called or attended a town meeting to promote the scheme, or gone down to Springfield to urge the passage of the law, or upon the fact that after the law failed he had united with other citizens to promote by voluntary contributions the thing the law failed to give?

Would the court have considered such suggestions, or given its process to collect illegal assessments to pay invalid bonds to holders who were as much chargeable with knowledge of their invalidity as the tax payers?

In the case at bar the bonds were signed, issued and sold by the commissioners of the drainage district, and the interest paid was paid by them. The land owners had no control of the question whether bonds should be issued, and no contractual privity with those who bought the bonds. The bonds were

void and there was no estoppel against the commissioners to say so. Upon what principle then can a land owner be estopped, when it is sought to subject his property to a tax for the payment of the void bonds? If the drainage district had been held to be a valid municipal corporation, the courts would not have given a mandate for the collection of the tax to pay the void bonds—the thing it is here asked to do directly by its own process.

The case at bar is a stronger one for the denial of an estoppel than the South Ottawa case. In that case the invalidity of the law grew out of the fact that the Journals of the Senate and House did not show certain things which the constitution required to be shown. A minority of this court, in a dissenting opinion, held that an estoppel should have been allowed, *because*, the question, whether the Journal did, or did not, show the necessary steps to have been taken, was a *question of fact*. But the rule, as stated by the minority, would deny an estoppel in the case at bar. They say:

"When the question is one of construction alone, all parties stand upon an equal footing, and each can judge for himself. If a mistake occurs it is one of law and not of fact."

In *Norton vs. Shelby County, 118 U. S., 425, (442,)* it is said:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as if it had never been passed."

In the case of *Marsh vs. Fulton County, 10 Wal. 676,* it appeared that bonds had been voted by the county in aid of the Wabash railroad and were afterwards issued to a division of the road. It further appeared that interest had been paid upon the bonds (page 680) and other acts of ratification were set up. In the opinion of the court it is said: "It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It was a case, too, where the holder was bound to look to the action of the officers of the county to ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder." (Page 683.) And referring to the subject of ratification, it is said: "It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified, etc." (Page 684.)

In *Loan Association vs. Topeka, 20 Wal., 655,* the Supreme Court, after declaring the bonds in question void, it being beyond the power of the Legislature to authorize their issue, said: "We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the Legislature was without power to authorize the issue of these bonds, and its attempt to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot of itself create the power to levy taxes, resting on no other foundation than the fact that they once had been illegally levied for that purpose." (667).

"Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements." (*McClure vs. Township of Oxford, 94 U. S. 432.*) We insist that the bonds in question were not municipal bonds, for there was no municipality, but as they refer to the law under which they were issued, the purchaser thereof is charged with the knowledge of all the facts that he might have ascertained by investigation as to their validity and all facts of their issue; and, furthermore, that every citizen of the United States is supposed to know the law.

In *Post vs. Supervisors, 105 U. S. 667 (669)*, it is said:

"Fifth—That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued."

In *Parkersburg vs. Brown, 106 U. S. 487*, it is said:

"There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds, or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust."

The appellants have cited several cases decided by this court, and we will now proceed to examine them; we ask that

the precise question may be kept in mind, viz.: Can a mutual and honest mistake of law be made the ground of an estoppel, and a void law enforced as if it were valid?

In *Moran vs. The Commissioners, 2 Black, 722.* the estoppel was distinctly as to a matter of fact, and it was merely held, that when a county was authorized by statute to borrow money and issue bonds for the payment thereof, and the county authorities issued such bonds, reciting on their face facts which showed them to have been regularly issued, that the county was estopped by such recitals to deny their validity in the hands of a *bona fide* holder for value.

*Daniels vs. Tearney. 102 U. S., 415,* is the case most relied upon by appellants, but the case itself, when carefully examined will, we think, be found rather to support our contention, so far as it has any application to the case at bar. The Secession Convention of the State of Virginia, as one of the measures preparatory to secession, passed an act (April 30, 1861,) providing that any person whose property had been taken in execution might, by giving a bond for the payment of the judgment, have his goods released—not for a definite time, but so long as the law should stay in force. One Porter, recovered a judgment against one Daniels in the Circuit Court of Jefferson county. The judgment defendant availed himself of the law by filing the required bond June 1, 1861.

To a suit brought upon the bond by Tearney et al., Executors of Porter, after the civil war, it was answered that the law under which it was given was unconstitutional and so the bond was void. A majority of the court was of the opinion

that the bond was good as a common law bond. The objection of the minority to this view must, we infer, have rested upon the fact that the obligee had not accepted the bond—that as to him the whole proceeding was, as the full court held, *in invitum*. He had not in any way, expressly or impliedly, made himself a party to the illegal proceeding, or agreed to take any profit or advantage from it. The judgment defendant invoked the law, put it into operation, *nolens volens*, against the judgment plaintiff and had received the full benefit of the law. The consideration of his bond had been fully received.

A case more unlike the case at bar it would be hard to state. Here nothing was done *in invitum*. The contractors made a voluntary contract for an anticipated profit; the bondholders purchased the bonds voluntarily from the contractors for a profit of ten per cent. discount and an annual interest of ten per cent. The land owners submitted to assessments upon the consideration of a valid law for the equal assessment of all the lands benefited for the construction and permanent defense and maintenance of a levee system. If any lands benefited might escape an assessment for either purpose, the consideration upon which any land owner had accepted the law wholly failed.

That the opinion in *Daniels vs. Tearney* is hinged upon the consideration that it was not a case where the parties had voluntarily, and for a consideration moving to each, acted upon the mistaken belief that a law was unconstitutional, is clear from this paragraph:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be noted here, that where a party has availed himself for his benefit, of an unconstitutional law he cannot in a subsequent litigation *with others not in that position* aver its unconstitutionality as a defense," etc.

These italicized words are to be read in the light of the facts of the case. The obligee of the bond sued upon had not availed himself of the law for a benefit. The bond was put upon him. In the case at bar both the contractors and the bondholders did avail themselves of the law for a benefit.

It ought also to be noted here that in the Kentucky cases cited, the citizens who had at the request of other taxpayers borrowed upon their individual notes from the banks the necessary bounty money, or had advanced the money themselves, did not do this for an individual benefit; they were not of the class of contractors. They were agents doing without reward the bidding of principals who afterwards sought to escape liability. In the opinion in *5th Bush* it is spoken of as an "agency," thus:

"By what rule of equity or law should they be permitted to withdraw their assent to this assumed liability and agency, though it be evidenced by a statute instead of a mere personal contract."

It is to be further observed that in *Daniels vs. Tearney*, the proceeding was upon a bond brought by the obligee therein. The bond was enforced. In the case at bar the object of the suit is not to enforce a contract between the complainants and

the land owners, for there was none such—but to put into operation by a decree of this court the processes of a void law.

The value of *Daniels vs. Tearney* to the appellants, if any, must be found, not in the case proper or in the principles applied to the facts of that case, but in the supposition that this court, by citing certain cases, has committed itself to principles of law that were neither called for nor used in the judgment it rendered. Perhaps this is the best place to examine these cited cases.

The Kentucky cases, *Ferguson vs. Landram, 1 Bush. 548, Same vs. Same, 5 Bush, 230,* were cited by this court as we think, without a careful examination of the applications made by the Kentucky Court of Appeals of the supposed rule of an estoppel to assert the unconstitutionality of a law.

The rule as applied in the Bush case is this: That when what the court thinks to be a benefit falls upon any one out of an unconstitutional enactment he is estopped to deny its constitutionality, notwithstanding the fact that he had absolutely no part in procuring the law, and had neither said nor done anything with relation to any proceedings under it—the imputed benefit having fallen upon him as the rain falls upon the fields of the prayerless and unthankful man—unsought and unpreventable.

We resisted the petition for a certiorari, but are ready to agree that it was quite natural that this court should avail itself of the first opportunity to disclaim the imputation of having sanctioned such a rule.

In the Kentucky cases, the Court of Appeals held that a law permitting taxes to be levied to pay bounties to volunteers in order to supply the quota of a county and so to avoid a draft for the Union army, during the civil war, was unconstitutional for the reason, in substance, that to fill the army was a national and not a state purpose. The decision was probably wrong, and the hardship resulting to persons who had borrowed the money to pay the bounties was such that the court apparently strained its judicial powers to relieve them.

It was held that as to those who had promoted the law, or attended the town meeting, it was a good law, and that the county could go on and levy the tax upon their property. The extent to which the court goes is seen in some of the concluding paragraphs of the opinion. There, as here, there were classes who did diverse things, and were held liable for differing reasons to pay the judgment. The conclusion is announced by the court, that, as to everybody who received any benefit from the law, or to whom the court could impute a benefit, it was a good law. The court did not require any affirmative act on the part of the persons held bound, but held it enough if a benefit came to them *in invitum*. They had not asked for the law; they had done no affirmative act, but a benefit was imputed, and it was held to be a law, as to them. We undertake to say that no court, after full consideration, will feel like adopting these conclusions. Let us see what some of them were. We quote:

"Appellants A. P. Chambers (and certain others named) were all of military age and therefore liable, unless they show

some special reason for exoneration. Chambers attempts two. First that he was in prison when the first meeting was held, and therefore he did not participate. But this imprisonment ended before the money was borrowed, before the volunteers were obtained, and before the enactment was procured or the tax levied. Secondly. He asserts that he had been exonerated from the previous draft and was not required to pay the commutation thereunder; but he was only exonerated from that draft, not because of permanent disability; and, even so, he should have caused his name to be taken from the subsequent enrollment as each name increased the quota of the county. *Besides, he had two slaves subject to draft.*"

Here is a man in jail when the town meeting was held; who was exempted from a previous draft; who took no part in the business, but he was at large while some of these things were being done; and being at large, and his disability not being a permanent one, he had to pay the tax, because he did not cause his name to be taken from the enrollment—which if it had been done would not have relieved him, for he had two slaves who were subject to draft.

The court then names certain other persons of whom it says they were of military age, and continues:

"William Britt had a slave subject to the draft of 1864; hence his responsibility, which is not relieved by his certificate of exemption, dated February 11, 1865, after the liability had been incurred and the draft avoided."

He did nothing. He was not liable to be drafted, as it was proved, but he did not come in and get his name off the list.

The court then proceeds: "Jacob P. Howard (and others) had slaves subject to conscription, and Grigg approved the law and advocated the levy of the tax in the County Court; hence their liability. Bright (one of those named) perhaps was not then a citizen, but temporarily residing in the county." And yet he seems to have been held.

The court continues: "John D. Robinson advocated the levy of the tax before the County Court, and thereby ratified it, and both he and Grigg (who did not advocate the levy) had either sons or *sons-in-law* who were liable to conscription."

The court says as to all the above named persons the injunction was properly dissolved.

As to a certain other class of persons named, the court says: "As they were *not liable to conscription no valid reason* for enforcing the tax on them is perceived, as the evidence does not show either a benefit, procurement of the law or a ratification of it by them, which should appear affirmatively before an invalid tax could be enforced against them."

We do not find that the liability to the tax of a spinster having no living male relatives and no slaves, upon the ground of a possible benefit to result from the possibility that she might have some special interest in some bachelor who was liable to the draft was affirmed, but the rule announced would cover such a case.

It must be remembered also that the Kentucky cases were for injunction to restrain a tax and that all the court says is to be taken only as deciding that the complainants did not make a case for that discretionary writ.

The court did not, however, put the unconstitutional law into full operation. The law in the case of Boone county authorized the county to issue bonds to refund the sums advanced by citizens to pay bounties and to levy a tax to pay the bonds. It was held that the bonds could not be issued, but that the tax would not be enjoined as to certain classes of persons. The court did not give any process for its collection—only refused to enjoin the collection

But even the extreme and, as we think, untenable doctrine of these Kentucky cases will not save the case at bar—for no one was held bound who had not received the full benefit contemplated by the law. The scheme of the law had been fully worked out—everybody was relieved from the draft.

Let us suppose that it had been broken down at an earlier stage; that the draft quota was fifty men and only ten volunteers had responded to the offer of a bounty before the law fell. How would that situation have been dealt with? Would the court have held a man who was taken in the draft for forty men still liable for the whole tax on the ground that he had received a benefit because the ten volunteers had reduced the chances of his being drafted twenty per cent? Or would only twenty per cent. of the tax have been exacted?

All of these impossible and incongruous situations grow out of the attempts of the courts to apply this illogical doctrine that a law is a law and it is not.

It should be further noticed that the action in *Daniels vs. Tearney* was upon a bond—*inter partes*. The court was not asked, as in the case at bar, to reconstruct and put into operation the machinery of an unconstitutional law—to collect taxes illegally levied and pay over the proceeds for the discharge of bonds illegally issued. So in the cases cited by this court in *Daniels vs. Tearney* the actions were based upon a tort or upon an express or implied contract.

In *National Bank vs. Graham, 100 U. S., 699*, the action was for the value of a special deposit, and the defence was *ulta vires*.

In *Railway Co. vs. McCarty, 96 U. S., 258*, the action was to recover damages for injury to stock, and the defence was the Sunday law. The court held that the company, having put its defence on the ground of a lack of care, could not shift it to the Sunday law.

In *White vs. Franklin Bank, 22 Pick., (Mass.) 181*, the case was assumpsit for the amount of a time deposit which the bank was forbidden to receive. The action disaffirmed the illegal contract.

In *People vs. Murray, 5 Hill, (N. Y.)*, the suit was upon a bond—an express contract, and the consideration had been fully received.

The appellants cite *Dickerson vs. Colgrove, 100 U. S., 578.* In this case an estoppel based upon a disclaimer of any interest in a tract of land was set up. Some things said in this case are fatal to appellants' case. First, that estoppel involves fraud. Second, that it is always so applied as to promote the ends of justice; and third, that it can only be used for defense and not for assault. Here no fraud is alleged; to throw all the loss of a mutual mistake upon one of the parties does not promote justice; and the estoppel is here used as the ground of assault. (P. 580-1.)

In *Burlington vs. Gilbert, 31 Iowa, 356,* it appears that the city had ample authority to improve its streets by special assessments levied upon abutting property, when a petition was presented to the city council signed by two-thirds of the property owners to be affected; that the defendant and others signed and presented such petition, asking the improvement to be made, "that was made," and when the city solicitor reported that the petition was not signed by the requisite number of names, the petitioners took it, obtained additional names, and again presented it to the council. The work was done, *as requested in the petition.* Under these circumstances, it was held that those who signed the petition were estopped from raising the question whether the petition was signed by two-thirds of the property owners, and from questioning their liability for the work when completed.

The Circuit Court of Appeals, in the opinion below, said (Transcript of record on petition for certiorari, page 545):

"The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the Act of 1871, that what the land owners, proceeding under it, had in view, was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the Act of 1871, unless the *maintenance* of the levee, by competent legal authority, was assured. It is, therefore, unjust to the land owners to say nothing more than that they consented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to a scheme under which a levee was to be constructed *and maintained*, under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the Act of 1871, is to be looked at in its entirety. We cannot put out of view a vital part of it, and hold the land owners who acted in good faith, and who gave no personal assurances or made any representations, responsible for the results to others flowing from invalid legislation and the partial execution of the original plans. If it be said that the plaintiffs' testator would never have purchased the bonds, except in the belief that the Act of 1871 was valid, with equal truth it may be said that the land owners never would have sought, or desired, such legislation, except in the belief that the levee would be maintained by the same authority that constructed it."

But it is true, not only as to the land owners, but as to the bond holders as well, that the provision of the law for compulsory repairs was an essential part of the scheme. Mr. Palms would not have bought a bond but in reliance upon that provision any more than the land owners would have assented to an assessment without it. The bond holders' security, as well as that of the farmers, is found there. It was a mutual interest—an essential part of an indivisible consideration. In the bill and in the petition it is alleged that without a levee—meaning of course a structure that would keep the flood out, not one year, but permanently—the lands were worth no more than fifty cents per acre; that the defendants were "bound to preserve, protect, improve and repair the levee" by ratable assessments and a receiver is asked to make compulsory assessments to save the bondholders' security.

The Circuit Court of Appeals, in its decision, found nothing to sustain the view that the appellees or any of them were estopped to allege the invalidity of the law of 1871.

Referring generally to the cases that court said:

"Some authorities are cited which apparently support this view. But when carefully examined they do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by the present record."

Many of the cases were, as we have said, bills for injunctions; and many others relate to the waiver of constitutional provisions conferring personal privileges or exemptions. They do not at all involve the question of pursuing in an executory way the provisions of a void law.

In all of the cases cited, we think, when a special assessment was enforced, a valid municipal body existed with power to assess for local benefits, and in many of them the objection related to irregularity of method. We do not think there is any case where an assessment was levied by a body having no legal existence, or no power to assess for any purpose by any method. And all were cases where the party making the objection had received the completed benefits of the law, and the real ground of the judgments was an implied contract.

We will now proceed to examine some of the other cases cited from the state courts.

*Blake vs. The People, 109, Ill., p. 521, 522.* In this case there was no question of enforcing an estoppel against either party to the record. It was not asserted, either by counsel or the court, that any party before the court was not at full liberty to suggest the invalidity of any law.

In November, 1878, an amendment to the constitution of Illinois was adopted, providing as follows:

"The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby." (Const. of 1870, Art. 4, Sec. 31.)

Under this provision an act known as the "Drainage and Levee" Act was passed by the legislature of Illinois, providing that whenever a majority of the owners of lands within a district proposed to be organized, representing at least one-third in area of the lands, desired to construct a drain, levee, etc., or "to maintain and keep in repair any drain or drains, ditch or ditches, levee or levees, heretofore constructed under the law of this state," etc., they might present a petition to the County Court of the county in which the greater part of the lands were situated, asking for the appointment of commissioners, etc.; that on the hearing of the petition commissioners might be appointed, surveys made, etc., and the lands in the district assessed a proportionate share of the cost of the improvement, or allowed damages, by a jury appointed for that purpose.

*2 Starr & C., Ill. Stat., 2d Ed., Chap, 42, Sec. 2, etc., p. 1501, et seq.*

A levee district was organized under this act to preserve and repair a levee that had been built, or partly built, under the invalid law of 1871. A property owner raised the objection, among others, that the old levee had not been built under a law of the state, within the meaning of the act, because the Act of 1871 was no law. The court was only called upon to decide whether proceedings under the Act of 1871, for the construction of a levee, were within the purview and purpose of the Act of 1879. Indeed, it was not called upon to decide even so much as that, for it was held that the question was one to be raised on the confirmation of the assessment roll, and came too late on appeal. Now, in the state of the record, it was impossible that

the court should decide that the law of 1871 had become a law as to particular persons, or any person, by reason of acts done that worked an estoppel. No such person was before the court, and there was neither issue nor evidence on the subject. The most that could be said was that there might be some such person, and, therefore, the court could not say that the Act of 1871 was not a law of the State of Illinois, in the sense of the Act of 1879. It was known to the legislature, for the Supreme Court had so decided, that the Act of 1871 was unconstitutional and had no application to levees; and there was never any other act or law under which any proceedings for the construction of levees had, or could possibly have been taken. Strictly speaking, there neither was, nor could be, any levee in Illinois constructed under a law of the state. Is it, for a moment, to be supposed that the legislature intended the Act of 1879 to apply only to cases where it might be found that one man was estopped to deny that the Act of 1871 was valid law? Plainly, what the legislature meant, was to authorize the completion and repair of levees that had been constructed under an act, purporting to be a law, and specifically the Act of 1871. All that is distinctly recognized by the court. We quote:

"We are therefore of the opinion that so far as the levee was constructed and remained at the date of the filing of this petition it may fairly be regarded as falling within the meaning of the term 'under any law of this state.' This is moreover strengthened by the history of the constitutional amendment, of which we may take judicial notice. There was no law in force authorizing the construction of the levees over lands of others, (save the Act of April 24, 1871) at the time *Updike vs. Wright*

*and Webster vs. Levee Commissioners, supra,* were decided. To obviate the effect of those decisions—allow the construction of levees, as well as drains, upon the lands of others—and to authorize the formation of *quasi* municipal corporations for the purpose of constructing drains and levees, the amendment to Section 31, Article 4 (of the constitution), was submitted to, and adopted by, the people, at the November election, in 1878. The Act of May 29, 1879, but repeats, in this respect, the language of that amendment. The levees, therefore, which must have been referred to, because none other could reasonably have been intended, were the levees which had been constructed, but could not be kept in repair because of the decisions in *Updike vs. Wright and Webster vs. Levee Commissioners.*"

If the validity of proceedings under the Act of 1879 depended upon finding that some one or more persons were estopped to deny the validity of the Act of 1871, some direct proceedings against such person or persons would be necessary. It would not be enough to say that there might be some such person. The case cannot be accepted as an authority upon the questions here.

It should further be observed that the question as to whether the Sny levee was constructed "under any law of the State of Illinois," was not strictly before the court, as appears by the following language:—"It would, perhaps, be sufficient answer to this to say that we cannot take judicial notice that the purpose for which the corporation was created was not, in the language of the second section, 'to keep in repair drains, ditches and levees heretofore constructed under any law of this state,' and

whether, in fact, it was or was not, was a question to be raised and determined by proof on confirmation of the assessment roll, and it consequently *now comes too late.* But *assuming* the question to be properly before us, it must be decided against the appellant," etc. (P. 521.) It therefore appears that whatever is said upon this subject in the Blake case is strictly an *obiter dictum.*

THE AUTHORITIES CITED IN THE BLAKE CASE.

It is worthy of remark that the cases cited by the court in the Blake case, and by Judge Cooley, in his work on constitutional limitations, involve merely the waiver of property rights or personal privileges concerning no one but the party entitled thereto. In none of the cases were there any questions as to the future operation of the law. The controversies related to waivers already complete. In not one instance was it shown that the executory force, and perfect validity of the statute in dispute, was the main inducement to its acceptance by the parties, nor was it pretended that in any instance the purpose of the statute had failed or been defeated.

Many of the cases cited did not even involve the validity of a statute, but the power of a party to waive a privilege such as that of homestead, or the right of trial by jury. That such privilege may be waived in various ways is beyond question.

But suppose a statute was passed in this state providing that every defendant in a criminal cause, who would waive his right of trial by jury, should be entitled to select from a large list of judges the particular judge by whom his case might be

tried. And suppose a defendant, acting under such a statute, did waive his right to a jury trial, and afterwards a decision should be rendered by the Supreme Court of the State, holding the statute which purported to confer such a privilege on the defendant, void, or that the list of judges from which the defendant might make his selection must be largely reduced, would the law compel such defendant to abide by his waiver? It would be monstrous to so contend. Nor could any court reasonably hold that the defendant must be content to accept a part only of the privilege or advantage which induced him to waive his right. If by consent he made the law valid, he did so on condition that he should enjoy all the benefits by the prospect of which his action was induced.

In *Baker vs. Braman, 6 Hill, 47*, the leading case cited by Judge Cooley, it appears that a statute was passed, authorizing one man to take the property of another for his own use, at its appraised value. The party whose land was taken expressly consented. The whole matter affected no one but the parties, and there was no question as to the future operation of the law. The condition or consideration which had induced the consent of the party complaining, had not failed. It was contended on his behalf that his consent was void under the statute of frauds. The court held, that, while the act was unconstitutional, it was to be read as though the consent of the land owner was made a condition in the law itself, and that it was quite competent for the legislature to create an exception to the statute of frauds. The plaintiff simply consented that the defendant should enter upon and take his land on the terms specified in

the statute; and then, when the defendant had entered, he was sued as a trespasser.

To the same effect is *Embury vs. Conner, 3d N. Y., 511.*

The case of *The People vs. Murray, 5 Hill, 468,* has still less bearing on the present controversy. A statute of New York authorized a certain person to erect a dam across the Genesee river. The act required such person to give a bond to pay damages to any person injured by the dam, the damages to be assessed by a justice of the peace. The bond was given and the dam was built, and the person giving the bond resisted payment on the ground that the act under which the dam was built was unconstitutional because a jury trial was denied. The court held that the parties took the grant with the conditions attached, and could not be permitted to question the obligation. Not only had the defendant received the full benefit of the law to which he had assented, but he had entered into an express contract to pay the damages. The bond was absolutely valid and binding, without regard to the act in dispute.

*Lee vs. Tillottson, 24 Wendell, 339,* simply holds that a party who expressly consents to the appointment of referees in an action on account, waives his privilege of trial by jury.

*Mayor of New York, 8th Barbour, 489,* is another case of the class to which we have referred. An alms-house in New York required more land, and in 1821 the legislature of that state passed an act authorizing the taking of such land on payment of the value, to be assessed under a prior law. The land was appraised and paid for in full, the land owner accepting

the money ($13,000) without objections. Afterwards the city sold the land, and more than twenty years after the original transaction the representatives of the original owner sought to recover the price received by the city for the property in 1845. The court held that while the Act of 1821 was unconstitutional the owner, by accepting the compensation without objection, waived all questions as to the validity of the law. Here again is a case in which there was a complete acceptance and execution of the statute involved; and no failure of any part of the inducement. It was not a question of enforcing a void law but of holding a man to his contract.

In *Delwole vs. Brake, 46 N. Y., 318*, substantially the same question was presented, with the additional fact that after the land owner had consented to the appropriation of his land, and thereby waived all objection to the law, other parties were seeking to set up his personal privilege, and to urge objections on his behalf, which he did not set for himself. Of course, this could not be done.

We do not need, I am sure, to review the numerous cases cited by appellants, where the estoppel rested upon the ground that the person has, by his silence, where he should have spoken, or by speech or conduct, induced another to believe and act upon the belief that certain facts existed, or did not exist.

The reason upon which these cases are rested is, that one party was informed, and the other was ignorant of a fact. The express or implied representation was one upon which the other could rely. So far from suggesting that there may be an es-

toppel as to a matter purely one of law, as to which there was a mutual mistake, these cases proceed upon a line of argument that absolutely excludes an estoppel as to matters of law.

SOME OF APPELLANTS' CASES NOT BEFORE NOTICED.

In *Burlington vs. Gilbert, 31 Iowa*, one who had signed a petition for the improvement of a street was held to be estopped to deny the fact that the petition was signed by two-thirds of the abutting owners.

*Van Hook vs. Whitlock, 26 Wend., 43*, was a case where the acceptance of a dividend by a creditor under an assignment made in pursuance of a law that provided that the individual liability of the stockholders of the assignor corporation should be waived, was an effectual waiver, notwithstanding the fact that the law was unconstitutional. It was in the power of the creditor, for a consideration, to release the stockholders, and the court held that he had done so; his receipt for the dividend, under the invalid proceedings, was a good release.

In all of the local improvement cases that we have examined, the whole work contemplated by the law or ordinance had been done. The assenting property owners had received the entire consideration and benefit contemplated by the law. The cases also proceed upon the theory of an implied contract. We notice a few cases that may be taken as types.

*Jackson vs. Detroit, 10 Mich., 248*, and *Kellogg vs. Ely, 15 Ohio St., 64*, represent the cases where the remedy by injunction was refused. In the first case, Campbell, J., said:

"We do not think that a court of equity can properly interfere to relieve a party on the ground that assessments are irregular and unauthorized by the strict provisions of law, when they are substantially authorized by, and made in reliance upon his own express agreement." In both of these cases the work had been completed.

In another class of cases it is held, as we have before said, that constitutional provisions conferring particular personal benefits may be waived.

Of these the petition of *Edward Cooper, Mayor of New York, 93 N. Y., 507*, and *Lee vs. Tillottson, 24 Wend.*, are types.

In the first case Cooper took part in proceedings for the condemnation of real estate and signed a petition for the appointment of appraisers. He afterwards objected that the use was not a public one and it was held that he was estopped by his assent to the proceedings to set up his constitutional right that his property should not be taken without his consent for a private use.

*Lee vs. Tillottson* was a case where a party having consented in writing to a reference, afterwards set up his constitutional right to a trial by jury.

The case at bar is wholly different from any of the cases cited by appellant in this: That the court is here asked to take up and put into operation a scheme of special assessments made by a body that had no legal existence, and if it had, was forbidden by the Constitution of Illinois from making any as-

sessments for any purpose, to pay bonds issued without authority of law, and to introduce, by the use of the doctrine of estoppel, into the State of Illinois a taxing agency not allowed by the political system of that state, as against people who were guilty of no other wrong than an honest belief that a law was constitutional and who have not received the full benefit of the invalid law, but practically no real benefit.

CLASSES OF PERSONS SOUGHT TO BE ESTOPPED.

We do not think it worth while to enter into a discussion of the law of estoppel as applicable to the particular persons or classes of persons sought to be charged by the bill. But, as exhibiting the utter unreason of the complainant's contention, it may be well to notice some of the doings or non-doings that are made the grounds of the estoppels claimed.

1. One or more of the defendants are said to have procured the passage of the Act of 1871.

2. A few others are alleged to have actively participated, as petitioners and otherwise, in the organization of the levee district, or in the management before the bonds were issued.

3. Others of the defendants who took no part whatever in any of the proceedings—but were absolutely quiescent until after the bonds were issued—are charged because, after the bonds were issued and the law was held to be unconstitutional, they united with others in a futile effort to maintain and repair the levee by voluntary contributions—an act, it is said, of appropriation and ratification.

4. Others of the defendants, who neither said nor did anything, are sought to be held because, knowing that the proceedings were pending, and afterwards that the levee was in course of construction they neither said nor did anything.

5. Others are sought to be charged because they paid interest on their assessments for the years 1873 and 1874.

6. Another class is sought to be charged because they participated in the organization of the new and legal levee district after the Constitution of Illinois had been amended and a law enacted authorizing the formation of levee districts.

7. Another class consists of those who purchased lands since the decision of the Webster case, and whose deeds contained certain references to the assessments made under the Act of 1871.

*It must be kept in mind that the relief sought in this case is the collection of the assessments made under the law of 1871, and that estoppel is sought to be enforced against the right of the defendants to assert the invalidity of those assessments.*

A word or two now about these classes in their order.

1. We deny that the courts can impute to any one the "promotion of the passage of a public law." The suggestion is in derogation of the legislature. Upon this question the Circuit Court of Appeals said:

"But we are of opinion that it is not appropriate to say that the enactment was procured by any individual or individuals. It must be conclusively assumed that the legislature,

although hearing what individuals said on the subject, acted upon its own judgment as to what was proper to be done. It may be that under certain circumstances individuals may incur responsibility by reason of acts or representations on their part under an enactment adjudged to be invalid. But representations made by them to the legislature in reference to a proposed enactment, or any expression of their desire for the passage of such enactment, cannot be regarded as material in determining questions of responsibility or liability for acts done under or in execution of legislation supposed at the time to be valid but subsequently adjudged to be invalid." (Trans. of Rec., p. 546)

If this doctrine is allowed, the estoppel must more certainly extend to every legislator who votes for a bill, and to the presiding officers and chief executive who approve it.

2. As to the second class, the general discussion we have given is a full answer. These parties were not in privity with persons buying the bonds in the open market; they entered in good faith into the scheme of a law they believed to be valid, and were willing, if they could have the benefits the law purported to give them, to be subject to its burdens. They never gave anyone reason to believe that they would pay assessments for building a levee that they had no power to protect.

3. As to the third class, the acts upon which the alleged estoppel is based were done long after Palms and the others had purchased their bonds. These voluntary conveyances of lands as security for money to be raised to repair the levee

upon their faces repudiated any liability for the debts of the defunct levee district. And, as to an appropriation of the levee by reason of these repairs, we answer, first, there was no appropriation of it by these individuals, and could not have been; second, that if the bondholders had any lien upon the levee these acts did not affect it, save as the repairs would better the security; and, third, that these bondholders had no lien, legal or equitable, upon the levee and are not here asserting such a lien.

4. As to the fourth class, all that has been said as to the second class is applicable, and this further, that these only submitted, because they supposed they must, to what purported to be a law. No one was authorized to infer that they sought the levee or would pay an assessment that was not legal. And even if the court might, in any given case, say they were bound because benefits had been conferred by the law that they did not seek, it cannot in this case be said that they were benefited by a levee that presently broke and let in the river to flood their lands as before, and swept away improvements they had made upon the faith of a levee that could not be maintained.

5. As to the fifth class, surely no prejudice was done to those who had already bought bonds by the paying of money into a fund for their benefit, and quite as surely the payment of one installment of a tax is not a waiver to contest future installments. The cases we have cited from this court explicitly hold that such payments do not work an estoppel.

6. As to the sixth class—those who, after the constitution was amended and a valid levee law passed, organized a new

levee district for the construction of a levee—how did these acts, done long after appellants had bought their bonds, work any injury to them? So far from implying a confirmation or affirmance of the old assessments, the new proceedings went upon a total disaffirmance of them. If it is said that the remnants of the old levee were appropriated, that is a totally different matter, and one with which these bondholders had nothing to do, unless they had some lien upon the levee, which they did not; and even if they had, in this case they do not proceed for the enforcement of any such lien. The appropriation of the levee, or so much of it as remained, is in no way related to the question whether the old assessments can be collected.

(End of that part of the brief written by Gen. Harrison.)

The foregoing argument on the subject of "estoppel" is the only part of this brief actually written by Gen. Harrison, and it reached us after his death. He had, however, participated in the argument of this cause in the Circuit Court of Appeals, had considered substantially all of the subjects discussed in the brief, and approved the views we have taken of them. In this aspect his mind pervades the entire brief.

But we know from his letters, as well as from the brief itself, that he had not said all that he wished to say upon the subject of estoppel. He had not received a copy of the brief for petitioners in this court, and it was his intention to review some matters which would doubtless be discussed in that brief, and to consider certain other authorities cited on behalf of petitioners. We will, therefore, refer to those subjects and

cases, discussed in the Circuit Court of Appeals, as we understand them, although we have not yet received the brief of opposing counsel to be filed in this court.

7. PERSONS WHO PURCHASED LANDS SUBJECT TO LEVEE ASSESSMENTS, ETC.

It is insisted that parties who bought their lands under deeds containing recitals that they were subject to liens for levee assessments are thereby estopped to question the validity of the assessments.

These recitals are invariably found in warranty deeds, and amount to an exception from the warranty, as, for instance, "except levee assessments," or, "subject to all taxes, levee assessments," etc.

It may be conceded that if these recitals are in language sufficiently distinct to put a reasonable person on inquiry, they would amount to notice of the proceedings to which they refer; but such recitals do not amount to a personal contract, nor to an estoppel against the parties in whose chain of title they occur from making any defense which they have set up in this case. This question has been decided by this court in the case of *Bryan vs Forsyth, 19 Howard 334 (338)*, in which it appears that one Bogardus, in 1838, obtained from the United States government a patent to certain lands in Peoria, Illinois, which recited that the premises were granted "subject, however, to all rights of any and all persons claiming under the Act of Congress of 3d March, 1823," etc. One Forsyth claimed the same property under said Act of 1823, and it was decided that he

obtained a perfect title; and it was also held that "the patent to Bogardus was a fee simple title on its face, and is such title as will afford protection to those claiming under it, either directly, or having a title connected with it, with possession of seven years as required by the Statutes of Illinois." It was further held that the reservation in the deed Bogardus did not prevent him from relying upon the defense of limitations.

Another case involving a deed containing the same clause is that of *Mahan vs. Forsyth, 24 How. 175 (178)*, in which it is held that said saving clause was only for the purpose of exonerating the United States from any claim of the patentee in the event of his ouster by persons claiming under the act referred to; that the position of the patentee was adverse to that of those claiming under the act of 1823; that he was not their tenant nor did any fiduciary relations subsist between them; that the patent imposed no duty upon him to recognize their claims, and that there was no estoppel created by such recitals against pleading and relying upon statute of limitations.

The Supreme Court of this State reached the same conclusion in the case of *Lender vs. Kidder, 23 Ill. 49 (52)*, and in *Bryan vs. Melton, 125 Ill. 647.*

The latest decision of the Supreme Court of Illinois, affecting this question, is that of *Crawford vs. Nimmons, 180 Ill., 143.* In that case the defendant who had purchased land under a warranty deed containing the clause: "Subject to a certain mortgage indebtedness of two thousand dollars, and interest thereon, dated January 2, 1894," set up in his answer the defense of usury in the making of said note and mortgage

by his grantor, and in commenting upon that question the court say: "It has sometimes been said, in substance, that if the mortgagor sells the land, subject in express terms to a previous mortgage, the purchaser cannot question its validity; but when the cases are examined it will be found that additional facts have been required to prevent the grantee from making the defense. In all cases where it has been held that the grantee cannot question the validity of the mortgage he has purchased the property on the basis of a clear title at an agreed price, and has assumed to pay the mortgage debt *as a part of the consideration*, or the amount of such debt has been deducted from the purchase price of the land on the basis of such clear and complete title." The conclusion of the court was that the defendant was not barred by such recitals from setting up the defense of usury. While the cases cited above related to the defenses of limitations or laches and usury, they apply in principle to any other defense.

The petition for certiorari, under this head, refers to persons who "assumed and agreed to pay the assessment." We have not been referred to any evidence in the record that any of the defendants entered into such agreement. If any such language was used in any deed, it is merely only an awkward form of expression, for there is certainly no evidence that any purchaser of lands in the district "assumed and agreed to pay" the levee assessments as a part of the consideration for his purchase, and he would not be estopped, under the authority of the above cases. But if such an instance is to be found, yet no relief can be given in the present form of action. This is not a case of

a valid foreclosure (which would give the court jurisdiction) and a request for a deficiency decree as an incident to the original right of action, as in the case of *Keller vs Ashford, 133 U. S., 610*, cited by counsel. Moreover, that was a case originating in the District of Columbia, where, we understand, the distinctions between common law and equity practice are not maintained as in this State. Here, the remedy in such a case, if any, would be by *assumpsit*, and a court of equity would not have jurisdiction.

*Schmidt vs. Glade, 126 Ill., 485 (490);*
*Dean vs. Walker, 107 Ill., 540 (542).*

The courts of Maryland have passed upon this question of estoppel in two cases. In *Mayor, etc. vs. Porter, 18 Md. 284*, it appears that Porter filed a bill to enjoin the sale of his property to pay an assessment for street improvements. He had signed a petition asking for the improvement. The assessment was held illegal because the petition was not signed by a majority of the owners. It was held that signing the petitition did not estop appellee from questioning the validity of the assessment, and it was said: "But because the appellee has signed such an application, it surely cannot be successfully maintained that he assented that the work should be done *in any other way than the law requires*, or if he had so assented, that such assent could confer no power on the city commissioner not possessed by him under the law and ordinances of the city." The above case is sustained in *Mayor, etc. vs. Grana Lodge, etc. 44 Md. 436 (447)*.

Mr. Bishop, in his work on contracts, page 607, says:

"Judicial process interrupting the doing of a thing and rendering it impossible will excuse performance," citing *Walker vs. Fitts, 24 Pick. 191; Lord vs. Thomas, 64 N. Y. 107, Leopold vs. Salky, 89 Ill. 412., etc.*

In the case of the *People vs. Insurance Co. 91 N. Y. 174,* it appeared that a party had entered into a contract with the company to give his services for a certain consideration, and that the company was afterwards dissolved by the State. In an action brought by an agent who had been employed by the company against the receiver of the company, it is said: "What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within contemplation of the parties and must be deemed an unexpressed condition of their agreement.

If the act of 1871, and the proceedings of the County Court of Pike County thereunder, constituted the terms of a contract between Francis Palms and the owners of lands in the district, or any one of them, then the performance of that contract was rendered impossible by the action of the Supreme Court of the State of Illinois in the Updike and Webster cases. The contract could not be carried out by either party in a mode contemplated by the statute. That mode was not only important to the land owners, but was of the very essence of the agreement itself. If the method of collection provided in the statute could be pursued, and if a lawful right of way for the levee could be secured, all the lands in the district would have been forced to contribute in proportion to the benefits received, and

the purpose of the law, and of the parties who accepted it, could and would have been accomplished. Had the law remained in force they would have obtained what they expected in entering upon the enterprise.

The power which the statute purported to give them was not only the inducement which prompted the land owners, but the consideration on which the implied promise rested, and that failed. The conditions with which the land owners were confronted under the decisions of the Webster case and the breaks in the levee, was one of the most difficult problems that ever confronted men who were trying to build up a new community. The system or plan on which they relied had failed. The Mississippi river had devastated their lands. Without means to compel contributions to the completion and preservation of the levee, the entire enterprise instead of proving a benefit must necessarily prove a curse. They had invested their means of support in the district and were thus left without any protection whatever. The testimony is perfectly conclusive that not one of them would have moved a finger in establishing the district had he for a moment supposed that the assurances given by the statute of all means of preservation in the future was to be withdrawn.

Section 34 of the act of 1871 (R. p. 401-2) provides that the commissioners, when appointed and qualified, may do all the acts that are necessary in and about the surveying, laying out, constructing, *repairing*, altering, enlarging, cleansing, protecting and *maintaining* any drain, ditch, levee or other work for which they shall have been appointed, etc.

Section 39 of the same act gives the power to levy one or more new assessments, "on the suggestion of the commissioners, or any owner or occupant of lands affected by any work authorized in this chapter, either to supply any deficiency in any other assessment, to repair, alter, enlarge, cleanse, *protect or maintain* any drain, ditch, levee or other work constructed by virtue of this chapter." The purpose of those land owners who signed a petitition for the organization, as expressed in their petition to the County Court of Pike County was "for the purpose of constructing a levee," of "repairing, enlarging, *protecting and maintaining* said proposed levee." (R. p. 445). This they could not do when the act of 1871 failed.

Counsel for petitioners cite and rely upon certain cases decided by the Supreme Court of Ohio, which are: *State vs. Mitchell, 31 Ohio State, 592-610; Columbus vs. Sohl, 44 Ohio St., 479*; *Columbus vs. Slyh, 44 Ohio St., 484;* and *Tone vs. Columbus, 39 Ohio St., 281.* They all arise under the same act and relate to the same improvement—namely, the paving and improvement of a street in the city of Columbus. In the case of *Tone vs. Columbus, supra,* it was held that a party might be estopped from questioning the *validity* of the statute under which an assessment was made, but not estopped from questioning the regularity of the proceedings of the city council. A part of the language of the court upon this question is as follows: "Infirmities in the public statute he (the petitioner) may be presumed to know, but not in the proceedings of the council whose acts, as we have seen, he has a right to presume are regular." (Page 304.) In other words, he may be

estopped to question the entire want of power to do the act in question, but not the regularity of the proceedings of a city council. We do not know what respect this court may see fit to give to reasoning which arrives at such conclusions; but assuming that the reasoning is correct as applied to that case, it does not apply to the case at bar.

In all of those cases the facts were that the improvements were made *as contemplated* and that the petitioner in the Tone case asked to have it made. He received all that he asked for, and then applied to a court of equity to be relieved from the assessment. There is no suggestion in the opinion that he would have been held to be estopped or required to pay the assessment had he not received the full benefits intended to be conferred by the statute. The language of the court indicates that the receipt of the consideration which induced the action of the party held to be estopped was a very important element in the case. It is said: "When the above named requirements (signing the petition, etc.) are found *and it is shown* that the property owner has been benefited by the improvement, *at least to the extent that he has been thus benefited*, he will be estopped to deny his liability to pay." It will be found that there is no evidence in the record of the case at bar of any actual benefits conferred upon the several defendants by anything that was done for them or their lands under the act of 1871, or that was derived from the payment of Mr. Palms' money to the contractors. It is further stated in the opinion of the court in the above case that "It may be suggested here that while there was a want of power to order this improvement under the

act in question, and perhaps a total want of power to issue the bonds, there was ample *power vested in the corporation* to make the improvement and assess the cost of it under valid existing law," citing *Hitchcock vs. The City of Galveston, 96 U. S., 341.* These Ohio cases therefore all apply to that class where the improvement was made by a legally subsisting corporation, and one which had ample power under an existing law to make the improvement and to assess the cost of it.

Hence we discriminate these cases from the case at bar in these two important particulars:

First.—There was power in the city of Columbus to levy the assessment in question, altogether aside from the particular statute under which the bonds involved were issued, and the cases were between the city which issued the bonds and directed the improvements and the property owners.

Second.—The property owners who were held to be estopped had received the full benefit of what they had asked for, precisely to the same extent as though every provision of the law had been valid.

Great stress seems to be laid by counsel upon the case of *State vs. Van Horne, 7 Ohio St. 327.* A brief statement of the facts of the case will make it clear that it is not an authority on the case at bar. This was a proceeding by *mandamus* on the relation of certain owners of bonds against the state auditor to compel him to issue a warrant on the treasurer in favor of such bondholders for certain money raised by taxation and then in the treasurer's hands to pay interest on the bonds. Neither the

taxpayers nor the municipality were parties to the proceeding. The question of estoppel was not properly before the court. The bonds in question were issued in aid of a certain railroad on a vote taken and certified by the officers of the municipality to have been regular. The railroad was constructed, and the taxpayer received the *full benefit* of the bonds for which they had voted—received and retained the full consideration which had induced their action.

Moreover, the statute under which the bonds were issued contained a provision which made the records relating to the issue and the recitals in the bonds *conclusive* evidence that they were issued in accordance with the act. The only question raised against the validity of the bonds was whether the vote to authorize their issue could properly have been taken before the road was constructed, or whether it must have been taken afterwards. The court held that the taxpayers had received all that they asked for, and that the acts of the agents of the corporation in certifying to the regularity of the election, the issue of bonds, etc., would estop the agents of the taxpayers, as against innocent purchasers for value, and that the taxpayers themselves could not, under these circumstances, repudiate the acts of their agents. Evidently, this case has nothing to do with the general question of estoppel. It was a question of agency under the provisions of the particular statute in question.

Counsel also cites two Pennsylvania cases, *Bidwell vs. Pittsburg, 95 Penn. St., 412* and *Dewhurst vs. Allegheny, 95 Penn. St., 347*. These cases both arise under the same statute. The act related to the improvement of Penn avenue and certain

other streets named in the city of Pittsburg, and provided that its provisions might be extended to other streets on the petition of a majority of the property owners whose property fronted thereon, to be addressed to the city council. Under this act a petition was presented to the council signed by Bidwell and others, asking for the pavement of Ellsworth avenue, according to the provisions of the act, and five commissioners were selected who did the work, made the assessments, etc. Bidwell was not only one of those who signed the petition to the city council under which the paving was authorized and done, but he was also one of the commissioners who levied the assessments on the abutting property, including his own, sold the bonds, received the money and *completed the work therewith, as contemplated* in the petition and ordinances. It was held that the act in so far as it applied the frontage rule of assessment to rural property was unconstitutional, and the property in question was rural property; but it was also held that Bidwell was estopped from denying the applicability of the act to Ellsworth avenue.

The cases are by no means analagous to the case at bar. Bidwell actually received the money and improved his property to precisely the same extent as though the law had been constitutional in every respect. He received full value for the assessments imposed upon it by his own action. The court expressly refers to this question of value. They also, as in the the Ohio cases, refer to the matter as a contract and use this language: "It has been held that where a party has acted upon a particular construction of a contract which has been acquiesced in by the other, the latter is estopped from contest-

ing it as the proper construction." The petitioners in the case at bar, in asking for the formation of the district, not only refer to the construction of the levee, but to its *maintenance* by a system of assessments. In the case of the improvement of a street by paving, the entire benefits are conferred when the paving is done in accordance with the specifications, and the full consideration for the act of the petitioner has then been received. In the case at bar the building of the levee, even if it had been properly constructed in the first instance, was but a small part of the consideration which moved a few of respondents to apply to the County Court of Pike County for the formation of the district. The more important element, the maintenance of the system, completely failed them. The case of *Dewhurst vs. Allegheny* arose under the same statute, and is the same in effect as the Bidwell case.

Counsel also cite and rely upon several Indiana cases. The first of these cited is that of *Ricketts vs. Spanker, 77 Ind. 371.* This was a bill in equity by taxpayers to enjoin the collection of a tax to pay bonds for the construction of a gravel road. The act under which the assessment was made was held to be insufficient and there was no occasion to apply the doctrine of estoppel. The estoppel referred to in the opinion of the court is "an estoppel by judgment," (based upon the assessment proceedings), * * * and it is said, "The judgments and orders pleaded are a complete estoppel," (362). It has no reference to an estoppel *in pais.*

Another Indiana case is that of *Tabor vs. Ferguson, 109 Ind. 227;* but it will not appear that any question of estoppel

was raised by the pleadings, or was involved, in that case; it merely related to a question of notice.

The case of *Flora vs. Klein, 89 Ind. 208*, was an action at law, decided on demurrer to the declaration, and merely held that the language of defendant as set out in the declaration was sufficient to constitute a contract to pay for the work in question.

In *Nevins vs. Otter Creek Drainage Co., 36 Ind., 189*, there was no question of constitutionality, but merely of irregularity in the assessment for the construction of a ditch, which was made at the request of the defendant.

In the case of *Kellogg vs. Ely, 15 Ohio St., 64*, cited by counsel, the court merely decided that it would refuse complainant the relief prayed for by him of *injunction* against certain assessments, without directly passing upon any question of estoppel.

None of the cases cited by counsel for appellant, and none to be found, establish the doctrine of estoppel in a case like that at bar, where there is no fraud on the part of defendants and no misleading word or action addressed to the complainant on which he has a right to rely, and on which he has relied and acted. The utmost extent to which these cases go is to hold that under certain states of fact an unconstitutional law, and the proceedings under it, would be treated as in the nature of an implied contract, under which the party to be estopped had received *the full consideration* which had induced his action.

The consideration which induced certain defendants to sign the petition for the organization of the district (for example) was not the money which Mr. Palms or any other purchaser of bonds advanced to the contractors (for they had nothing to do with him, and did not receive his money); but it was the supposed grant of *power* by the statute to accomplish the complete purpose of reclaiming their lands by the construction and *maintenance* of a levee by a system of special assessments to which all lands in the district could be compelled to contribute —and not merely that the work should proceed half way, an embankment of sand and logs be constructed, and then that they should be abandoned to the mercies of the Mississippi river, without a law or other means for their protection. If this were a case of an express contract, based upon the terms of the Act of 1871, the defendant could plead failure of consideration.

## IX.

## AS TO MAINTENANCE AND SUBSEQUENT APPROPRIATION OF LEVEE BY THE PRESENT DISTRICT, OR ANY OF APPELLEES.

The levee was constructed in a sort of way, but never was really sufficient or nearly so. The first flood destroyed its usefulness. The land owners were left without protection. They tried every way to raise means for its preservation. By voluntary organization they succeeded in inducing the owners of about one third of the land in the district to execute a deed of trust on their lands, and on this a large sum was raised. But this was a failure. After years of effort an amendment to the con-

stitution was obtained by vote of the people of the State, an act of legislation was passed, a new district was formed, and a new debt was incurred to accomplish what the old law failed to do.

Did the subsequent expenditure of money in order to save what remained of the old levee injure anybody? If Mr. Palms had any claim on the work he was benefitted. If he had no claim his interests were not affected. Certainly what was done years after he obtained his bonds did not induce him to buy those instruments, nor mislead him, or induce him to put himself in any worse position.

But we maintain that what occurred after he bought his bonds did not concern him in the least. Subsequent appropriation of the fruits of a man's money, sometimes entitles him to follow those fruits. But Palms' money did not build the old levee, nor enter into it. He had no lien on it whatever, either in law or equity. In fact he was an utter stranger to it.

*Litchfield vs. Ballou, 114 U. S. 190.*

This case is cited with approval by Mr. Justice Harlan, in the opinion of the Circuit Court of Appeals, Trans. 548-9.

## X.

## MR. PALMS OR HIS EXECUTORS CANNOT BE SUBROGATED TO ANY EQUITIES OF THE ORIGINAL CONTRACTORS.

Granting, for the purpose of this argument, that the contractors might, under certain circumstances, pursue or obtain

a lien upon the work which they had done or paid for, can Palms be placed in their shoes?

The answer is contained in the case of *Aetna Insurance Co. vs. Middleport, 124 U. S., 534.*

This case is exactly parallel, so far as relates to the principle of subrogation.

In that case the town of Middleport had issued certain bonds to aid in the construction of the railroad; the road was constructed and the bonds delivered to the railroad company in payment of the work and afterwards sold to complainant. They were held invalid by the Supreme Court of the State of Illinois, and a bill was filed in the United States Court to enforce their collection, the complainants seeking to be subrogated to the rights of the railroad company, to enforce the contract evidenced by a vote of the town appropriating the amount involved to pay for the railroad, and the acceptance and fulfillment of the contract by the railroad company. It was decided, in substance, that the complainant, having bought the bonds as negotiable securities from the railroad company, could not be substituted to any rights which it might have had against the defendants; that no right of subrogation existed; that it could be applied only in cases where a junior incumbrancer was forced to pay off a superior lien for the protection of his rights, or in some similar case; and that a mere volunteer was not entitled to claim the right.

In the case at bar no bonds were ever sold by the commissioners of the drainage district to Francis Palms or any one repre-

senting him. (Trans. p. 372.) They were delivered to the contractors who constructed the levee (Trans. 80-81) and after each portion of it was completed and accepted, so far as it ever was completed, and were taken in payment at ninety cents on the dollar of their face value. (Trans. 366-7.) All of the more important alleged equities averred in the bill existed before Mr. Palms obtained his bonds. We refer more particularly to all acts of any land owners for obtaining the enactment of the act of 1871; the signing and filing of the petitions under which the work was undertaken and the bonds issued; to those who voluntarily paid their interest for the years 1873 and 1874; those who had notice of the assessments and did not object to them, and those whose lands would be benefitted by the building of the levee and who offered no objections, and those claiming under these various classes. All these acts were done, as we have said, before Mr. Palms obtained his bonds, and if they created any equities it was in favor of the original contractors who built the levee. Mr. Palms cannot assert such equities unless he can be subrogated to the rights of said contractors, and this he cannot do under the authority of the above case. In both instances corporations undertook the construction of certain works, and employed contractors to do the work. In both cases the contractors were paid by bonds, issued by the corporations. In both instances the bonds were held practically void as to the corporations issuing the same. And in both the purchasers of the bonds claimed subrogation to the rights of the contractors from whom the bonds were purchased. But in the Middlefort case the Supreme Court of the United States held that the purchasers of the bonds were mere volunteers,

who had no interest which entitled them to be placed in the shoes of the contractors. They were mere volunteers, with no such relations to the parties as would entitle them to subrogation.

Admitting, for the purpose of the argument, that if the contractors who built the Say Levee had not been paid, they might have claimed an equitable lien on the work itself, certainly, Palms, who bought the bonds, had no such right. The bonds were only issued as against each section of the work on its supposed completion. Therefore, not a dollar of Mr. Palms' money built any part of the levee. By the sale of the bonds, the contractors indemnified themselves for the work done, but that no more gave Palms a lien on the work than a man might acquire by lending money to another for the purpose of paying off a mortgage. The case last cited is absolutely conclusive on this point.

It therefore follows that Palms was an entire stranger to the levee, and its preservation or appropriation by any person whomsoever did not concern him. Had his money built it, or had he any kind of lien on it, he might say, with some show of reason, that the land owners, who afterwards appropriated a part of it, estopped themselves to dispute the collection of assessments. But Palms had no relation to the levee, and therefore the use that was made of it after he obtained his bonds, gave him no rights whatever. In fact, the equities of Mr. Palms must be determined from the condition of things existing when he obtained the bonds, as those alone could influence his action, and upon those alone could he rely.

Even if Mr. Palms' money did enter into the construction of the levee, (which we deny), yet it was intermingled with that furnished by hundreds of private individuals, by the new levee and drainage district, by three railroad companies, and $50,000 expended by the United States Government; so that neither the money nor its product could be specifically identified, and no lien could be given for it, under the authority of *Litchfield vs. Ballou, 114 U. S., 190.*

But, if we were to concede for the purpose of our argument, that the complainants can come into this court and occupy the same position that the original contractors might have occupied, yet they cannot do so as innocent purchasers without notice, for we have already shown that the so-called bonds were not negotiable securities under the law merchant, and moreover, they contained on their face a reference to the only authority under which they were issued, which was notice to purchasers of their illegality. So that, if complainants as purchasers of the bonds can come into court at all to enforce their supposed equities, they are in no better position than the original contractor would have been and are subject to any equitable defense which could have been made against a suit brought by such contractors. If the contractors were now seeking to enforce their claim they would be confronted by the mass of evidence contained in this record, a small part of which is referred to in our statement of facts, showing that the levee was very imperfectly and even fraudulently constructed by them; that nearly all of the early breaks were caused by such faulty construction, resulting in a loss to

the land owners many times greater than the original cost of the levee itself. It is shown that these losses amounted to at least $2,300,000 (Trans. pp. 205, 157-58, 314); and that the losses in 1876 alone were at least $1,000,000 to personal property (pp. 116 and 121), not including the depreciation in real estate and injury to improvements.

## XI.

### THE LACHES OF FRANCIS PALMS AND PETITIONERS.

Aside from all other grounds of defense, the laches of Francis Palms during his lifetime, and of his representatives since his death, constitutes a complete defense in this case, and is relied upon as such in the answer of respondents. The original bill of Francis Palms against the commissioners of the drainage district was filed May 4, 1878, and the last order entered in that cause July 7, 1880. No further steps were taken during his lifetime. He died Nov. 24, 1886. The supplemental bill was not filed by the present complainants until April 22, 1889. Therefore, if the present bill be regarded as supplemental to the original bill, as contended by counsel for petitioners, then their action is barred by the failure to prosecute with due diligence a suit already instituted. This court said in *Johnson vs. Standard Mining Company, 148 U. S. 360 (370)*: "It has been frequently held that the mere institution of a suit does not in itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun," citing with approval a number of authorities from various courts.

But we insist that no suit was instituted against the present defendants until the filing of the supplemental bill, in 1889, and the service of process thereafter. These defendants were not parties to the original proceeding. The only defendants were the original commissioners, of whom at present only Mr. George W. Jones survives. These land owners were in no way represented by the commissioners, as we have shown in another part of this brief—that is, they were not "parties by representation." It seems clear to us that neither the complainants nor Judge Drummond understood that they were so represented when the orders were entered giving the complainants permission to bring the land owners before the court. The case, then, as to these defendants, is this: That in the year 1876 the Supreme Court of Illinois held the Act of 1871 unconstitutional and the proceedings thereunder void; that if Mr. Palms had any action at all, it then accrued; that he was given a right to proceed against these defendants by the orders of 1879 and 1880, and that a period of at least nine years elapsed before any of said defendants were brought before the court. We will not repeat what has been heretofore said with reference to these former "decrees" so-called. They are but decretal or interlocutory orders; but if they had the force and effect of solemn judgments and final decrees, that force would have ceased long ago, for no attempt was made to enforce them until the expiration of their lives as statutory liens.

In this state, neither a judgment at law nor a decree in chancery has any force against third parties after the lapse of seven years from its rendition.

*Secs. 1 and 6, Chap. 77, Rev. Stat.*
*2 Starr & Curtiss, 2d Ed., p. 2324 and 2334.*

An action to recover real estate is barred in this state, first, by seven years' residence thereon (construed to mean by the owner or his tenant, etc.,) under a title of record from the state or United States; secondly, by seven years' adverse possession under color of title and payment of taxes; and, thirdly, as to unoccupied land, by seven years' payment of taxes under color of title.

*Rev. Stat. of Ill., Chap. 83, par. 4, 6 and 7.*
*2 Starr & Curtiss, 2d Ed., pp. 2604-5 and 2618.*

Almost all defendants have proved adverse possession under the above statute, or at least a very large proportion of them. Ever since the land owners ceased paying levee assessments in 1874 and 1875, and denied any validity in the assessments or bonds (as they understood was settled in the Webster and Updike cases), they have been in adverse possession to all parties claiming a lien by virtue of the assessments or bonds. When this adverse possession was continued for seven years, either under tax deed or any other deed, regular on their face, accompanied by the payment of taxes, the bar of the statute was complete. It has been frequently decided that a tax deed is sufficient "color of title" in this state, if regular on its face.

*Stubblefield vs. Border, 92 Ill., 279;*
*Thomas vs. Eckhardt, 88 Ill., 593.*

The defendants in this case do not claim "from any common source of title" with complainants, and are affected by no principles based upon such a situation of parties.

Moreover, the doctrine that no adverse possession can begin to run until the right of action accrues, can have no bearing on this case; for Mr. Palms was given permission to proceed against the land owners in 1879, and whatever right of action he had, *then* accrued, if not before, and he and his representatives did not avail themselves of such permission for nearly ten years.

If the present bill is to be treated as a bill of review, as it states on its face, then it could be brought only within the time allowed for the bringing of a writ of error, to-wit:—five years.

*Bell vs. Johnson, 111 Ill., 374:*
*Allison vs. Drake, 145 Ill., 511.*

It is a general rule, subject to few exceptions, that a court of chancery follows the law in applying the statute of limitations—that is, that a cause of action which would be barred at law will also be barred in equity, and where there are exceptions a sufficient equitable excuse must be alleged in the bill, and sustained by the evidence, to account for and justify the delay.

*Walker vs. Ray, 111 Ill. 319-20,* and cases cited.

But equity goes further than the law, and refuses relief on the ground of laches in many cases where there would be no bar to an action at law, usually founded upon some change in the conditions or relations of the parties or the subject matter of the suit.

*Id. 322.*

Various decisions of this and other courts are reviewed in the opinion rendered by Mr. Justice Brown, in *Gallagher vs. Cadwell, 145 U. S. 368*, and in summing up the effect of these cases it is said: "They all proceed upon the theory that laches is not like limitations, a mere matter of time; but *principally* a question of the inequity of permitting the claim to be enforced--an inequity founded upon some change of the conditions of the property or the parties." (P. 373.) This language was approved in *Penn, etc. Ins. Co. vs. Austin, 168 U. S. 696-7*, in which relief was denied after a period of less than five years. *Johnson vs. West Ind. Transit Co., 156 U. S. 647-8.*

Various authorities upon this branch of the subject are cited in the opinion of the court in *Johnston vs. Standard Mining Company, supra, (370-1)*, and it is there said: "The law is well settled that where the question of laches is an issue, the plaintiff is charged with such knowledge as he might have obtained upon inquiry, provided the facts known by him were such as to put upon a man of ordinary intelligence the duty of inquiry." (370.) We shall show hereafter that Francis Palms was not only subject to the "duty of inquiry," but that he actually knew the existing situation in the drainage district. It is further said in the above case that "Where property has been developed by the courage and energy and at the expense of the defendants, the courts will look with disfavor upon the claims of those who have lain idly by while waiting the results or this development, and will require not only clear proof of fraud but prompt assertion of the plaintiff's rights." (371.)

The duty of prompt diligence in prosecuting a claim against property of a speculative value, is clearly set forth by Mr. Justice Miller in *Twin Lick Oil Co. vs. Marbury, 91 U. S., 587 (592).*

The same principles have been frequently announced by the Supreme Court of Illinois. In *Williams vs. Rhodes, 81 Ill., 571 (588)*, it is said: "Numerous cases have been decided by this court where delay for a much less period than that fixed by the Statute of Limitations has been held to preclude the right of a party to bring suit. In such cases, it is said, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, the prosecution of the suit; and no general rule can be laid down for the guidance of the court in every case. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title to relief where the property is of a speculative character, or subject to contingencies, or where the rights or liabilities of others have in the meantime been varied." Similar language has been used in a later case, *Walker vs. Warner, 179 Ill., 16.*

Complainants' bill in itself shows the property in the levee district was of a highly speculative character, worth 50 cents per acre in its natural state, and an average of $25.00 an acre if fully reclaimed (Trans. p. 42-3.) The record is full of evidence showing the extremely hazardous nature of the enterprise, the numerous breaks in the levee, the varying value of the property at different times, and the different contingencies to which it was subjected. It also shows that it was changing hands from time to time, and all these circumstances imposed

upon Francis Palms and his representatives the duty of prompt diligence in prosecuting their cause.

An amount of money has been expended since 1876 in the construction of the present levee by the land owners, by the present drainage organization, by the United States government, and by three railroads, much in excess of the amount expended by the original organization, as shown in our foregoing statement of facts.

No excuse whatever is averred in the bill, or shown in the testimony, for this long delay. No negotiations are proven looking toward a compromise until about the time of the filing of the supplemental bill. An illustration of the changes that have occurred in the ownership of the property is found in the fact that of the 116 signers of the original petition to the County Court of Pike County (Trans. 146) only 37 were living and made defendants to the present bill in 1889 (Trans. 26), and the evidence shows that a number of these had died before the testimony was completed (in 1893), a number have since deceased, and many have disposed of their entire interest in the drainage district.

In this connection we will call attention to the fact that there was no record or index in the office of the Recorder of Deeds of Pike or Adams County showing either of the assessments under the original drainage district, or any reference to them, as required by Section 28 of the Act of 1871 before such assessment could be notice of the lien thereof to all persons, as shown in our foregoing statement of facts.

While no justification for this delay is attempted in the bill, the solicitor for petitioners seeks to explain it on the ground that the bonds in question did not begin to mature until 1882, and were not therefore barred at the time the supplemental bill was filed. A sufficient answer to this is to say that this cause is not based upon valid legal obligations, as to which the owner might properly wait to bring his action until any period prior to the expiration of the Statute of Limitations. We think that we have sufficiently demonstrated in a preceding part of this brief that the so-called bonds have no legal existence as such. This is, in effect, completely admitted by Mr. Palms and his representatives when they come into a court of equity and ask equitable, rather than legal relief. If the bonds are valid, as such, there is a complete remedy at law, and complainants have no standing in a court of equity.

But another sufficient answer to this claim that Mr. Palms might have delayed the bringing of any action until his bonds matured, is the fact that *he did not do so.* He filed a bill to collect both his principal and interest. He asked in that bill for "an accounting for the *moneys advanced* by complainants to said commissiorers as aforesaid and interest thereon." (R. pp. 13, 427); and made the following a part of the prayer to his bill: "And when the amount due to your orator *for principal and interest* as aforesaid is well ascertained, may it please Your Honors to order and declare that your orator is entitled to a lien upon the said levee," etc. (R. p. 428.) In the decretal order of March 13, 1879, leave was given "the complainants * * * * to go before the master and produce their

said bonds and coupons and interest thereon, and make proof of the amount due them of *principal and interest* on account of such loan. (R. p. 437.) The master's report is not printed in the record, and we have not at present access to it, except so far as it is stated in the order of July 7, 1880. It may be true that its calculations related only to interest, but complainant produced his bonds, the amount of which was not disputed, and he was again, by this order, given leave to file a bill. (R. p. 441.) The total of the master's findings of interest due was $304,908.26, of which the sum of $221,228.26 (R. p. 439) was found to be due Francis Palms. This was certainly a sufficient sum to test the question of the liabilities of the land owners.

Judge Drummond, in giving complainants permission to prove up principal as well as interest, doubtless took the view that if the bonds were not valid as legal obligations, complainants might have some equitable relief based on the original consideration invested in the bonds. In this view, whatever right of action there was, if any, accrued when the money was parted with. This was the view taken by the learned Judge who decided the Middleport case in the Circuit Court. He held, in substance, that the bonds being unconstitutional, the right of action accrued for the original consideration when the money was parted with, and that the suit was barred by the five years' statute of limitations.

*Aetna Ins. Co. vs. Middleport, 31 Fed. 874.*

But whatever may have been in the mind of Judge Drummond, this record shows that on March 13, 1878 Mr. Palms, with certain other complainants, did file a bill to enforce the lien for

both principal and interest; that on July 7, 1880 he had permission to bring all the land owners into court to test the question of their liability, and that he did not do so; nor did his representative do so until after a period of nine years had elapsed.

But the petition for the writ of certiorari filed in this cause undertakes to give another reason for the long delay, which is as follows: "*In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners were expending money in repairing*, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due." (*Pet. pp. 45 6.*) Here we find the real reason for this long delay. Mr. Palms knew that "there were extensive breaks in the levee in 1880, followed by more in 1881;" that "the land owners were spending money in repairing" these breaks; that, as averred in his bill, the lands were not worth to exceed fifty cents an acre (or a total of $50,000.00), and were wholly inadequate security for his bonds, unless a good and sufficient levee was constructed (R. p. 42).

The question has been heretofore treated as one of laches; but the fact is it was not so much laches as a deliberate lying by until the unwary land owners should have, by new and valid proceedings, and by new assessments upon their lands, made complainants' security good. The petition has, with almost admirable frankness, told us the cause for this long delay, which was not oversight nor neglect. The admission is that the filing of the bill was purposly delayed until the land owners had, by fresh contributions, restored the levee and so made good the complainants' security.

If we now turn to page 2 of the petition, we find this statement: "It has remained unbroken since 1888 and has grown as solid as the natural embankment." The foregoing citations from the petition are very significant, when taken in connection with the history of the drainage district and the conduct of Mr. Palms with reference to the proceedings of the land owners. Early in 1876 the Supreme Court of Illinois decided that the proceedings under the Act of 1871 were void, and in April of that year the levee was broken in numerous places and the land reduced almost, or quite, to its value in the state of nature, as shown by references in our opening statement. Immediately thereafter individual land owners went to work filling the breaks and in 1877 entered into a voluntary trust deed embracing about 30,000 acres of land in the district for the same purpose. Mr. Palms might have filed his original bill immediately after the decision of the Supreme Court in 1876; but he waited for two years, until the levee had been restored, and filed his bill May 4, 1878. This was prosecuted while matters seemed to be going favorably to the land owners. The foregoing admissions show, which is fully established by the evidence, that there were numerous breaks in the levee in the year 1880 and in 1881, by which the lands were again greatly reduced in value and the confidence of owners and investors in their ultimate reclamation very much shaken. Therefore Mr. Palms again takes no action.

Meanwhile a new drainage district was organized in 1880 under the provisions of the Act of 1879, following the constitutional amendment of 1878. Large assessments were levied

upon the lands aggregating hundreds of thousands of dollars, and meanwhile Mr. Palms did nothing, and allowed the land owners to go forward, spend their money and increase the value of the property. He died in November, 1886, and there would seem to be no good reason why his executors might not have proceeded immediately, if they intended to do so at all. But the levee broke again in the early part of 1888, and the present complainants waited until additional assessments of $150,000 had been levied upon the land before filing the present bill. All this has the appearance of premeditated delay, while, as stated in *Johnson vs. Standard Mining Co.*, *supra*, "Property has been developed by the courage and energy, and at the expense of the defendants." These expenditures would never have been made if Mr. Palms had filed his supplemental bill when he had permission to do so.

The conduct of Mr. Palms after July, 1880, was such as to induce owners of lands in the district who knew of his claims, to believe that they had been abandoned, and the record shows that very many of the landowners knew nothing about his suit. It is not a case of a "sleepy eye," either on the part of Mr. Palms or of the present complainants, but of watchfulness for an advantage. Mr. Palms knew the risks of the enterprise, and the struggle that was going on to reclaim these lands, and having rested upon his rights with such knowledge for a period of about nine years, we earnestly insist that not only the provisions of positive law, but that every consideration of justice and equity, demand that he and his representatives should not now be permitted to enforce his claims against those by whose

energy, courage and expenditure the lands have attained whatever value they now possess.

The opinion of the Circuit Court of Appeals rendered by Mr. Justice Harlan in this cause is not expressly based upon the ground of laches; but it is very clearly indicated that in the opinion of the court this would have been a sufficient defense had no other existed, as appears from the following language: "He (Mr. Palms) was given leave to file a bill by an order entered in 1879, but he died in 1886 without availing himself of the privilege so given, although a large amount of interest was then due, and although almost $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a Court of Equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the decree which becomes a lien, except upon the renewal of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' adverse possession under color of title and payment of taxes, or as to unoccupied land by seven years' payment of taxes under color of title. (*See S. & C. Ill. Stat., C. 77; Sec. 6; C. 83, Secs. 4, 6 & 7 pp. 1386, 1538,*" etc.) (Trans. p. 551.)

As we have remarked above, this enterprise was an extremely hazardous and speculative one, so far as the land owners were concerned, practically to the same extent as mining lands or oil property. It was also hazardous as to Mr. Palms, and he deliberately accepted that hazard. He obtained a concession of not less than ten per cent. from the face of the bonds in making his purchase, and was to receive ten per cent. upon their face value. For this valuable consideration he took the risk knowingly. He sent his own counsel, Mr. John Atkinson, to Illinois to investigate as to the validity of the bonds in question, which he contemplated purchasing from the contractors. (*R. p. 371.*) The opinion of Col. Atkinson was obtained by him (but addressed to John Heffron, Esq., one of the bondsmen for the contractors), and shows that "July 22, 1871, (1872) the Commissioners filed the assessment roll and asked for its confirmation. Two appeals were taken, as appears by the files, and *are undetermined.*" (*R. p. 457.*) The report of Col. Atkinson was submitted to Hon. G. V. N. Lothrop, and by him approved. These objections were prosecuted from the County Court to to the Circuit Court and thence to the Supreme Court of the state, where they were held invalid. (See, also, R. 249.)

The bonds in question were not even negotiable instruments within the meaning of commercial law. True, they were made payable to bearer and might have been so assigned as to transfer the legal title, but they did not contain the elements of paper under the law merchant. They were not payable absolutely, but only out of a particular fund, as shown by the face of the bonds. (Trans. 469-70.) They impose no absolute per-

sonal liability, either on the district or on the commissioners. If the fund arising from the assessment should be exhausted, there would be no means of meeting the unpaid balance on the bonds.

*1 Randolph on Com. Paper, p. 140, Sec. 107,* and cases cited.

*Turner vs. Peoria, etc., R. R. Co., 95 Ill., 134 (144-6).*

*3 Kent Com., 76.*

Had the petitioners been willing to rely upon their bonds as legal instruments, valid under the law, independently of any individulal consent or dissent, they might fairly contend that they were not bound to move until all the bonds matured, and until such period thereafter as was allowed by the statute of limitations; but they were not willing to rely on any such proposition. They have sought the aid of a court of equity and pray a lien for the security of the bonds by virtue of a judicial decree. The facts which they now claim entitle them to a decree were open to controversy. The very term *in pais* presupposes conditions existing "in the country," as distinguished from the record or the law. The circumstances of the district and the *personnel* of its people were constantly changing. A broad controversy was liable to be raised, involving facts extending over a series of years, and became more and more difficult to establish. Witnesses were liable to die, and no doubt were dying. If Mr. Palms desired to obtain a decree giving him a lien, and to found the same upon the personal acts of individual land owners, and to make the same notice as powerful as a a writ of injunction to all subsequent dealers with the property, then he was bound under every principle of equity to proceed at the

earliest possible moment. The court had permitted him to do so. He was not content to rely on the law as giving him a valid legal claim against the district; but he desired to rest upon a new and distinct cause of action, namely, the promise and contract of the land owners. Such a claim would be barred in this State by the five-year statute of limitations.

Another reason for requiring prompt action on the part of Mr. Palms, if any was to be taken by him, is the fact, disclosed by his bill, that he knew of the decision of the Supreme Court of Illinois in the Updike and Webster cases, and that the land owners were relying on those decisions for their protection. Practically every one in the district was familiar with the decisions of the Supreme Court in those cases, and especially with the latter, as it arose in Pike county, was tried in its courts and its results were known to every one. Those who contributed to the repair of the old levee or the construction of the new one, or did anything to improve their property, acted on the belief that those decisions constituted a part of the law of the land upon which every citizen might depend for the protection of his property rights. They affected the rights of every owner of land in the district, and related directly to the entire subject matter of this suit. Therefore, if Mr. Palms sought to obtain a decree from the Federal Courts which would, in effect, set aside the rule of property established by the state courts in those cases, it was incumbent upon him to act with the utmost promptness.

But those cases apply with special force to the defendants who purchased their lands during that long period when Mr.

Palms did nothing to assert his rights, and prior to the filing of the present bill in April, 1889.

A reversal of the principle established in those cases amounts to the abrogation of a rule of property which had been in existence in the state for thirteen years prior to the filing of the present supplemental bill. The law as stated therein entered into and became a part of every contract for the sale or mortgage of land in the district during that period, the obligations of which cannot be impaired by subsequent legislation, or by a subsequent change of decisions. This has been established both by decisions of this court and of the highest court of Illinois.

In the case of *Douglas vs. Pike County, 101 U. S., 677*, this court said: "The true rule is to give a change of judicial construction in respect to the statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retrospective. After a statute has been settled by judicial construction that construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and the change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of legislative enactment." (*P. 687.*)

See, also, *1 Kent's Com., 476.*

This principle is fully sustained in *Harmon vs. The Auditor of Public Accounts, 123 Ill., Rep. 122 (136)*, and cases cited.

The land owners had a right to assume from the conduct of Mr. Palms, that he had abandoned any claim that he had ever asserted against the levee or the lands in the district.

Supposing when the people of the district were confronted with the necessity of doing the work over again, when by reason of the failure of the original structure they had lost more than three times the money invested by Mr. Palms and by the complainants put together, they had been told that they must again submit to the same extent of taxation to accomplish the same purpose and also pay the old assessments held void by the highest court of the state, does anybody suppose that they would have advanced a single step? Had this been proclaimed to them Mr. Palms might have looked to the lands, worthless as they were, but not a finger would have been raised by the people to save the levee or to save those lands, and no new purchasers would have invested in them. Moreover, under such circumstances, many land owners would have been unable to obtain, by mortgage or otherwise, the funds necessary for repairs. Therefore, we say, that if it had been the intention of Mr Palms to obtain a lien, or to establish an equity under the judgment of a court, and by reason of certain alleged acts of participation done by the land owners, or any of them, it was his clear, palpable and bounden duty to have proceeded at such time and with such promptness as would have given to the whole world notice of what he intended.

The owners of the lands had changed greatly; the years were doing their work; sales and mortgages, incumbrances and transfers were going on from week to week, and the currents

of life and death were proceeding as they always will proceed. Land owners were dying, heirs were born and the people were struggling to save their property, and still Mr. Palms paid no attention to this suit or the district; but merely waited for the people to reclaim the district and make his security valuable.

This was the time for Mr. Palms to file and prosecute his suit against the land owners defining those whose active participation was supposed to have rendered their lands liable, and defining the lands of each against or upon which he claimed a lien. By this means all concerned would have been notified—not by rumor, but by valid legal process. The records of the court would have notified everyone dealing with the lands of the fact that there were claims against the same, and the extent of such claims.

But nine years went by and not a word from Mr. Palms or his representatives. Then, after the constitution of the state had been changed and statutes had been passed affecting the lands and the interests of all the people; after probably four-fifths of the lands in the district had changed hands; when after long years success was practically achieved, Mr. Palms' executors proceeded not merely to revive his original bill, but to file a new one setting up an alleged equity which he knew from the beginning, if it ever existed at all. This they called upon the land owners to come in and defend themselves against.

We maintain, now, that before this last bill was filed Mr. Palms had in law and equity abandoned the lands and the levee and all claims that he had against the land owners and their

property. He remained silent when he should have spoken, and now he or his representitives cannot be heard to speak when they ought to remain silent. Petitioners invoked the principle of estoppel; we now invoke it against them.

We therefore earnestly insist that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

BENJAMIN HARRISON,

ASA C. MATTHEWS,

THOMAS WORTHINGTON,

*Counsel for certain Respondents represented of record by them.*

HARRY HIGBEE,

J. OTIS HUMPHREY,

*Of Counsel.*

No. 38

In the Supreme Court of the United States

October Term, 1901.

MICHAEL W. O'BRIEN, ET AL., EXECUTORS, ETC., OF THE LAST WILL OF FRANCIS PALMS, ET AL.,

Appellants,

vs.

JOHN G. WHEELOCK, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

# STATEMENT AND BRIEF


A. G. CRAWFORD,

For Appellees (Complainants in Error).

JEFFERSON ORR,

Of Counsel for Same Appellees.



The H. W. Rokker Co., Springfield, Ill.

IN THE

# Supreme Court of the United States

---

MICHAEL W. O'BRIEN ET AL., Executors, etc., of the last will of Francis Palms, et al.,
*Appellants,*

*vs.*

JOHN G. WHEELOCK, ET AL.,
*Appellees.*

*Appeal from the Circuit Court of the United States for the Southern District of Illinois.*

---

## STATEMENT AND BRIEF.

May it Please the Court:

I am very much embarrassed in presenting cause of my clients, as I have no copy of brief of appellants in this court, and am compelled to state our position upon the assumption that counsel will make absolutely the same

argument to this court as was presented to the court of appeals upon the hearing in that court, hence, I will be compelled to use my brief in that case also.

The following statement may seem irrelevant and not responsive to the brief of appellant for the reason above stated:

STATEMENT.

While counsel for appellant has, I presume, here as in court of appeals, made an extended statement as to the pleadings, and a brief statement as to the facts, counsel must have inadvertently left out some things or overlooked them, one of the most important of which is as follows: On page 5 of his brief, referring to record pages 12 and 13, counsel omits the gist of the allegation of their own bill. The allegation is and was as follows: "That said commissioners acquired the legal title to the lands required for the site of said levee, and in reliance on said assessments contracted for the construction and completion of the said levee; and under the authority of said act and an order of said Pike County Court, *borrowed, upon bonds issued by them, $499,500, payable at different dates, with annual interest at ten per cent per annum, and sold the same, relying upon the acts of the General Assembly aforesaid, and confiding in the integrity and sense of justice of said landowners, of which said Francis Pulms purchased at par $202,500, and the commissioners used said money in the construction and completion of said levee;* that thereafter it became necessary to raise an additional sum to complete said levee, and a second petition was filed substantially similar to the first,

and like proceedings thereon were had, and an additional assessment was made for the sum of $148,500, under which said commissioners issued and offered for sale $148,-500 of bonds, which were all taken by said Palms, relying upon the facts above mentioned, and upon the further fact that the owners of the land benefited, had raised and furnished the defendants from and on account of the assessments upon their lands the moneys necessary to pay the interest coupons on said bonds maturing in 1873 and 1874 at par, and the money received by said commissioners therefor was expended in the construction and completion of said levee; that said commissioners constructed said levee and other works in accordance with said plans and surveys to such height that all of said lands were protected from overflow from the Mississippi River, and all said lands were reclaimed and rendered healthy and productive, and benefited to an amount greatly in excess of the sum assessed against them, *and the entire expense was paid by said commissioners with full knowledge of all the owners and occupants thereof out of the money advanced by said Palms and other purchasers of said bonds.*"

The above was the allegation in the bill when the demurrers were argued and overruled, and still remained until all of the evidence was taken, and the case was on call for argument on November 5, 1895, when, by leave of court, the following amendment to the bill was made: "On further motion of the complainants, by their solicitors, leave is granted them to file an amendment to the bill of complaint herein, *alleging that the complainants purchased*

*the bonds from the contractors instead of the commissioners.*" (See transcript, bottom page 472), and counsel makes the same mistake on page 47 of his argument.

The demurrers were argued and overruled, with the allegation still remaining in said bill, that Francis Palms had bought the bonds from the commissioners, relying upon certain facts recited, and that the commissioners used the proceeds of the bonds purchased by Palms in the construction and completing of this old levee. Yet, after answers to the bill containing that allegation, and the evidence all taken, and the case called for trial November 5, 1895, the amendment was made, "that the bonds were bought of the contractors;" the allegation as it stood was not sustained by the evidence, and a new cause of action was alleged, with the apparent purpose of taking advantage of the law as to subrogation, or placing Palms in the position of the contractors, and contending that the contractors had certain equities, and that Palms was subrogated to the equities of the contractors as against the landowners; of which we will hereafter say more.

Counsel for appellants, we think, on page 33, is mistaken when he says, "It is proven beyond dispute that the location and construction of the levee was paid for by the proceeds of the bonds issued by the commissioners. (On Record p. 81)." An inspection of the record will show that Mr. Jones testified that *during the progress of the work, we paid for it under the contract with Skelsey, Fuller & Pierce, with levee bonds at ninety per cent of their value.*" The whole evidence in the case

shows that Mr. Palms bought these bonds from the contractors and their bondsmen, who finally completed the work, were paid in bonds — not bonds sold— and the contractors offered these bonds for sale, and Mr. Palms, after investigating the matter, and employing eminent counsel to investigate the legal question and advise him, purchased the bonds upon the advice of his attorneys as to the validity of the bonds; not that the lands in the levee district could be subjected to any equitable lien.

We think the counsel is mistaken in his statement on page 34 of the brief, "that the defendant, C. N. Clark, with money advanced for the payment of his expenses by other defendants named *and with the knowledge and approval of all of the then known occupants and owners of said lands*, procured from the legislature of the State of Illinois the passage of the act of 1871," etc. The evidence shows without contradiction that nearly every man in the lower end of the levee district opposed the levee from its inception. The case of *Webster* v. *The People* was only a test case taken up, by which a great many other cases then pending in the Pike County Circuit Court should be settled, and the testimony of nearly all of the witnesses as to the south end of the levee district is, that they understood from that time on, that the whole levee assessments and proceedings under the law of 1871 was void and of no effect.

We respectfully differ with counsel for appellants, in his statement on page 40 of the brief, "that the contract-

ors constructed the levee in accordance with the plans and surveys of the commissioners," etc. While Messrs. Corthell and Parkhurst, witnesses, substantially state that to be the fact, the testimony of many of the witnesses for the defense is altogether different, and shows that the contractors did not construct the levee as contemplated by plans and surveys.

Counsel for appellants, we think, is not warranted in his statement, on pages 40 and 41, in saying, "Not before the 26th day of January, 1887, did the commissioners cancel and release the trust deeds, and then this was done in pursuance of another and more extensive scheme for the continuance of said levee, *and the defeating of the complainants' testator from recovering the moneys furnished by him for the construction of the levee.*" Complainant's testator had then been dead for more than a year; the purpose for which these trust deeds had been given had long since ceased to exist, and were a cloud upon the titles of the landowners joining in same, hence, should have been released. How could they have been released for the purpose of "defeating complainant's testator from recovering moneys furnished by him for the construction of the levee?" He never furnished any moneys to the commissioners, or landowners, to do anything with. He bought, or took, no bonds from the commissioners, and furnished no money to them. He bought the bonds from the contractors, or, to be more accurate, from the bondsmen of the contractors, Hefferon and others, upon the market. This suit of *Palms* v. *Levee Commissioners*, was and had been, pending upon

the original bill against Messrs. Jones, Wheelock & Westlake, as levee commissioners. Mr. Palms, in 1880, by his attorneys, obtained leave of court to file an amended bill, or supplemental bill in the nature of a bill of review; but *he had lived after that leave was given six years, and filed* no amended bill or suplemental bill, or paper in the proceeding; and more than a year had elapsed after his death before these trust deeds were released, and, in the meantime, we are justified in saying that nearly all of the landowners supposed that the old suit against the commissioners had been abandoned, and would never be pressed again, and most of the present landowners inherited or purchased their land in the meantime, as many of the witnesses testified, without any knowledge of the pendency of this suit, and in the firm belief that the decision in the Webster case had absolutely defeated any recovery upon the bonds issued by the levee commissioners now involved in this suit.

We differ with counsel for appellants in his statement as to many of his assumptions of facts established, and in his conclusions, based upon assumptions of facts. He alleges that all of the defendants had actual notice of the various proceeding in the Pike County Court, and the acts of the old levee commissioners, and what the commissioners did with the bonds and proceeds of the sale of bonds sold by them. The evidence does not justify that assumption. As we understand it, the old levee law of 1871 did not require personal notice or service in any proceeding, it was only done by posting notices. No personal notice or service was required to be given the land owners as to

filing petitions for the Drainage or Levee Organization; no personal notice or service was required as to the empaneling of the jury, or as to when or how assessments would be made; no personal notice or service was required to notify them of what the assessment of the jury was. These notices, and all other notices to landowners, were to be made by posting notices in the drainage or levee district. They had no actual notice of this suit pending in the United States court, as they were not defendants at that time. Many of them never heard of it until they were served with summons, after filing the supplemental bill, bill of review, or bill of revivor, as it is variously called, in 1889.

The old commissioners could not have been acting for the landowners after the law was held void, in 1876, by the Supreme Court of the State of Illinois; the commissioners ceased to have any power or authority as commissioners after the decision in the Webster case was rendered in 1876; up to that time they had been using every effort to collect the assessments, made by the jury, with which to pay interest to the bondholders, but could, as officials, do nothing after that decision. When called into court on the original bill, they could only say what they did in their answer. They had no power; their hands were tied, the Supreme Court of the State had declared the law under which they had acted unconstitutional and of no effect, and that all of their acts and all preceedings in organizing the levee district were void; they had no means of collecting the assessments then made and no authority or means

of raising any funds or money from any source; no court could empower them to raise money to either pay interest on the bonds, or to pay bonds, or to even repair or improve the levee. Had they continued as officials of the old levee organization, they would only have held a naked office, with no duties to perform and no power to enforce the payment of any moneys for any purpose; hence, the assumption that they were acting for, and were the representatives of, the landowners, we think, is unwarranted by the evidence.

Counsel for appellants assumes, in his statement and argument, that all of the landowners, then and now, are liable for the construction of the old levee, on the ground, *first*, that the law of 1871 is constitutional and valid, and authorized the issue of bonds and the levying and collection of assessments, to pay the same, upon the lands in the levee district; *second*, that if the law is and was unconstitutional and the bonds issued declared invalid, that all lands in the district have been greatly benefited by the construction of the old levee, and that all present defendants are liable, or their lands in the district are liable, hence complainants have a remedy in equity. He wholly ignores the fact that, by the building of the old levee, and the various repairs, reconstruction and change of location and keeping of the levee up has been a great damage to most of the defendants in the lower end of the district, instead of a benefit, and claims that the complainants are subrogated to the rights of the contractors, each of which positions, we think, unsound.

ADDITIONAL STATEMENT OF FACTS.

I think best at this point to make a statement of the facts as to the additional defense, as to the lands and owners thereof in the lower end of the district, nearly one hundred of whom we represent in this case.

It is conceded by all parties that this levee district, as originally formed, or was attempted to be formed, under the law of 1871, is fifty two miles long along the east side of the Mississippi river, extending from Fall creek in Adams county, through Pike county, and to Hamburg in Calhoun county, and of a width of from three to five miles, excepting at the lower end, where it is about a quarter of a mile in width at the foot of the levee. As clearly shown from the evidence of Bramble, Prince, Chamberlain and many other witnesses, at the northern or upper end of this levee, opposite Hannibal, Missouri, the Sny, a stream from one hundred to three hundred feet in width, left the Mississippi river and extended through the levee district to Hamburg bay, at the lower end of the district, with numerous outlets from the Sny to the river opposite, where various large creeks from the uplands ran through the river bottom into the Sny; that there are seven to nine large creeks variously distributed from the north end of the levee to the extreme south end of the levee (Hamburg bay), carrying large bodies of water from the uplands, through these creeks into the Sny, and from there into the river, when there were rains or floods, without any great rise in the Mississippi river; that there is no outlet from this levee district, fifty-two miles long, excepting through the narrow

outlet at the lower end of the Sny, for all these large creeks; that there is no system of drainage to carry off the great bodies of water that flow down through these creeks into the bottom lands, in time of freshets and high water, but all remains upon the lands in the levee district or is forced through the small opening at the lower end of this district; that when the water is high in the river, and the levee now existing, or the original levee, keeps the water from the Mississippi river from overflowing these lands, the water backs up through the opening at the foot of the levee, and inundates and covers the land for about twelve to fifteen miles, in the lower end of the district north to the Chicago & Alton R. R., and a little above, and when the river is high enough for the levee to be any protection from overflow from the river, that the back-water above mentioned meets the flow of water from all of these large creeks, extending from the north end of the levee district, and, hence, it not only raises the water higher than it would be over the lands in the lower end of the district if no levee were there, but it causes this water to remain a great deal longer on these lands; that the lowest lands in the levee district are near the center of the bottom lands between the river and the bluffs; that many, if not all, of the lands in the lower end of the levee district, near what is called Bay creek, were worth from twenty-five to fifty dollars per acre before the old levee was built, which are now worth less than one-fourth what they were then, and that this depreciation in the value of these lands, and the injury to these lands for agricultural and sanitary purposes, have been occasioned by the build-

ing of the original levee from 1872 to 1874, and also the repairing, reconstructing and keeping up of this levee since that time; but the counsel for appellants wholly ignores this phase of the case in his statement and argument.

Other attorneys for the defendants—appellees—having most thoroughly and completely argued this case upon every phase presented, I shall argue the questions involved and our positions briefly.

We think there can be no recovery in this case by complainants, and base our argument upon the following premises:

First. The levee law of 1871 is and was unconstitutional, and all acts under it are void; the issuing of the bonds in this suit was without authority of law and they are void, because there was no law authorizing the commissioners to issue the bonds or create an indebtedness to construct the levee.

Second. The United States courts will follow the construction of the State Supreme Court, as to the Constitution and the statutes of the state, and follow the first decision rendered by the State courts upon its statutes or Constitution.

Third. If the bonds were valid, the complainants' remedy is at law, not in equity.

Fourth. The United States courts will not appoint any one either to assess or collect assessments of taxes, either at law or in equity, and, in this case, the registering of the bonds provided the method for collecting the assessments.

**Fifth. The complainants can not claim the right to enforce any equitable rights the contractors might have had, if any.**

Sixth. The interlocutory orders in the Circuit Court of the United States will not be binding upon any one, especially those defendants who were not parties at the time.

Seventh. The lands of the defendants in the lower part of the levee district comprise about one-sixth of the lands: which lands are not and never have been benefited by the levee, but have been greatly damaged and depreciated in value, and the landowners in that end of the levee district have, almost to a man, opposed the levee system from its inception, including the old levee organization and the present levee organization.

I.

I maintain that the bonds are invalid. The Constitution of the State of Illinois at the time of the passage of the Drainage Act of 1871, in Article 4, Section 31, of the Constitution, provided: "The general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others." It will be observed that, according to the wording of the above section, it provides for the construction of the drains and ditches only. No mention whatever is made of the building of a levee to protect the lands from inundation or overflow from rivers or other streams.

Section 5, Article 9, Const. 1870, provided: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

A State or Commonwealth is sovereign, but a county, city, town or village, or other municipal corporation, is not sovereign; it is a creature created by the law-making power of the sovereign, and has no rights, power or authority, excepting such as are conferred by the law-making power of the sovereign, the legislature. Such has been held to be the law by the courts of nearly all the States, and, frequently, by the Supreme Court of the State of Illinois.

The legislature, or general assembly of the State, have no right to make any law unauthorized by or in conflict with the Constitution of the State. The Constitution of 1870, of the State of Illinois, empowered the legislature of the State to pass laws authorizing or permitting "the owners or occupants of lands *to construct drains and ditches for agricultural purposes, across the lands of others.*" (See Const. 1870, Art. 4, Sec. 31.) The legislature, or general assembly of the State of Illinois, in 1871, attempted to pass an act authorized by this section of the Constitution.

The first section of that Drainage Act is as follows: "Be it enacted by the people of the State of Illinois, represented in the General Assembly: That whenever one or more owners or occupants of land shall desire to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural or sanitary purposes, such person or persons may file a petition in the County Court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, *and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same, as proposed*, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter."

It is apparent the legislature attempted to comply with the above-mentioned section of the Constitution in passing the Drainage Act of 1871, but the Constitution nowhere provides for building a levee, or other work to protect lands from overflow or inundation, but to construct drains and ditches only; yet the legislature seems to have had in mind that in order to construct the drains and ditches for agricultural or sanitary purposes, it might become necessary to erect a levee to assist in the drainage of lands.

The original petition, filed in County Court of Pike County, for the organization of the claimed levee district,

in this suit, represents "that they (petitioners) desire to construct drains and ditches, *and also a levee*, and other work across the lands of others in said bottom lands for agricultural and sanitary purposes, and that they desire to construct the same upon and along said bottom lands so as to *reclaim said bottom lands from overflow by the waters of the said river*, in order to make the location salubrious and render the soil fertile for tillage, and otherwise develop the agricultural resources of the said bottom lands; and further say that it is necessary that said drains, ditches, *levee* and other work should be constructed." (See Record p. 442.)

It will be seen from that, this petition prayed for an organization with greater powers and rights than were conferred by the act of the legislature of 1871, as that act only authorized the construction of a levee to aid and carry out the object intended by constructing drains and ditches; but this petition, while it speaks of drains and ditches, expressly shows upon its face that the primary, in fact, sole object of this drainage organization prayed for, was for the purpose of constructing a levee fifty odd miles in lenght, to prevent the overflow from the river. The legislature, in the passage of the drainage act of 1871, exceeded the power given in the Constitution by authorizing a levee, but the petition in this case, and all proceedings in this case went far beyond the power conferred by the legislature; the legislature attempted to empower a drainage commission to construct ditches and drains for agricultural and sanitary purposes, and, if necessary to carry out that purpose, to construct a

levee. But this petition and all proceedings under it was not for the purpose of constructing drains and ditches for agricultural and sanitary purposes, *but was for the purpose of building a levee to protect the lands from overflow and "to make the location salubrious and render the soil fertile for tillage, and otherwise develop the agricultural resources of said bottom lands."* From the above it seems to us clear to the mind of any one that this drainage district, as organized, was not authorized by either the Constitution or the act of the legislature.

We need not have any difficulty upon that question, however, for this has been fully settled and determined by the Supreme Court of the State of Illinois in the case of *Webster* v. *The People*, decided in 1876, not reported in full, wherein the court say: "The principal questions raised and discussed in this case are the same as in *Updike* v. *Wright*, decided at the present term, and for an expression of our views, reference is made to the opinion in that case. For the reason there given, the judgment in this case will be reversed and the cause remanded." (See Record p. 459.) This case of *Webster* v. *The People* grew out of the resistance and opposition of Webster to the collection of the assessments made in the so-called drainage district, the commissioners of which issued the bonds mentioned in the bill of complaint in this case. It is the same levee district and the same assessments upon lands described in *Exhibit A*, in the record in this case, and the county collector, the auditor having certified the same to him, was attempting to

collect assessments to pay the interest on the bonds mentioned in the suit at bar; and in that case, by adopting the decision in the case of *Updike* v. *Wright*, 81 Ill. p. 49, the Supreme Court of the State of Illinois held the drainage act under which this old drainage district was organized, unconstitutional and void, and that the bonds issued by the commissioners of this drainage district were void absolutely; that they had been issued without authority of law and were no liens upon the lands, and could not be collected or enforced. In the case of *Updike* v. *Wright*, *supra*, on pp. 51–52, the court, referring to the drainage act of 1871, say: "This statute was evidently passed in view of that clause of the Constitution which declares 'the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others.' Art. 4, Sec. 31, Const. 1870. Apparently an effort was made to have the law enacted to conform to the constitutional provisions in every particular. Hence, it is declared, the work to be done is to construct drains and ditches for agricultural and sanitary purposes, and, if it becomes necessary in the construction of a system of drainage that 'levee or other work' be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated, the owners or occupants may undertake under the provisions of this law, the building and maintenance of an immense levee on the borders of a river not connected with any system of drainage by ditches. Neither

the Constitution nor the statute contemplates any such work. What was in the minds of the framers of the Constitution, and the legislature who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of 'levee or other work,' is always in connection with a system of drainage in that mode. The work outlined by the Constitution and the statute is comparatively insignificant and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash (Mississippi) river; that their fences and crops are liable to be swept away and destroyed by an overflow and that the same can be prevented by an earthwork levee. * * * Any construction of the statute that would warrant the owners or occupants of the land to enter upon such an immense and costly work, seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes 'levee or other works' may be undertaken as auxiliary to the drainage of lands. Our opinion is, this is the only construction the statute will bear, consistent with the Constitution; otherwise, one owner whose lands are subject to overflow at certain seasons of the year, from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity, which commissioners appointed by the court might deem benefited by the improvement. Such a work can not be said to be draining lands by drains and ditches over the

lands of others; nor is such a levee in any just sense, in the language of the statute, 'necessary to the drainage of the lands.' The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is, therefore, without authority of enabling law."

The above is not the mere dictum of the court; it is the decision of the court and the reasoning for the decision that the drainage organization was about to build and construct a levee along the Wabash, and also a levee along the Mississippi river, which was unauthorized, either by the Constitution or act of the general assembly of the State of Illinois. The above decision is not simply a case analogous or parallel to the one at issue, *but it is the same case that is at issue here*; and the highest court of the State has said in the above cases that it was not authorized by either the Constitution or the statute. But the court continued, on pages 52 and 53: "But the decision may be placed on the other ground indicated, that the general assembly possesses no power under the Constitution to vest the commissioners or juries selected, or the County Court, with authority to assess and collect taxes, or special assessments, for the contemplated improvements."

"Section 5, Article 9, of the Constitution of 1848, which declared 'the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the

same,' was always construed, by the decisions of this court, as a limitation upon the power of the general assembly to grant the right to assess and collect taxes to any other than the corporate or local authorities of the municipalities or districts to be taxed. *Board of Directors* v. *Houston*, 71 Ill. 318; *Harward* v. *The St. Clair and Monroe Levee and Drainage Co.*, 51 Ill. 130; *South Park Commissioners* v. *Solomon*, 51 Ill. 37; *Gage* v. *Graham*, 57 Ill. 144; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105. It was also held that power in the legislature was subject to the further limitation that a local burden, or taxation or special assessments, could not be imposed upon a locality without the consent of the tax-payers to be affected."

"That section of the Constitution of 1870, upon this subject, provides, 'the general assembly may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessments or by special taxation on contiguous property, or otherwise.' For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

"The clause in the present Constitution, like that in the Constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns and villages with power to make local improvements by special assessments, or special taxation upon contiguous

property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns and villages are within the constitutional provisions, and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same."

The court continue reasoning and illustrating, and upon page 56, say, in regard to the levee organization and the right to issue bonds for the construction of levees, "In the case at bar, this immense work (which, if completed on the plan proposed will subject all the property in the vicinity that, in the judgment of the commissioners or juries selected, may be benefited, to a heavy and burdensome taxation), was commenced under the decision of the court as to its property, and not upon any election of the people upon whom the burden will fall. If this act could be held to authorize the imposition of such burdens in the mode the assessments were made in this case, it would be in contravention with the Constitution as well as with the plainest principles of right and justice."

The *Updike* v. *Wright* case, from which the above quotation was taken, was a bill to enjoin the collection of the said assessments made by that levee organization under the laws of 1871. The Circuit Court granted the injunction, and the Supreme Court affirmed the decision of the lower courts. The case of *Webster* v. *The People*, *supra*,

was an objection to judgment being rendered under the revenue act of Illinois, asking judgment against his lands for the collection of the assessment made by the jury empaneled by the court in proceedings for the organization of the levee drainage district, mentioned in this case, the commissioners of which issued the bonds involved in this suit. And although *Updike* v. *Wright* was a suit in equity, the same questions arose as to the validity of the bonds, and the court was called upon to construe the act of the legislature and the proceedings to organize each of the said districts; and in each case the court held the drainage organization was without authority of the Constitution or the statute of the State, and that all acts creating indebtedness or the issuing of bonds were absolutely void and without effect.

Counsel for appellants, in his argument, quotes from the case of *Blake* v. *The People*, 109 Ill. 504, to sustain his position that these bonds are valid. We were the unfortunate counsel for the appellent Blake in that case, and it was a case where the counsel were handicapped because Blake never had actual notice of the organization of a levee district in 1880, embracing the same lands involved in the old levee district, nor of assessment by a jury under that organization against his land, and did not file objections to such assessments; but when, through the process of collecting the assessments, the county collector asked for judgment against the lands of Blake, he appeared and contested upon various grounds, among others, that this levee organization was not formed to repair, rebuild and construct a levee under

any former law of the State of Illinois; and in that case the court held, not that it was a valid levee organization under the law of 1871, which constructed this levee, not that the proceedings take in the County Court to build and construct this levee was authorized by the law, nor that the levee commissioners had power to issue bonds to build and construct the levee. They simply held, incidentally, that the old levee, taken possession of by the new organization, might have been constructed under the former law, although the former law was invalid, as to certain powers conferred upon the drainage organization and the commissioners thereof, and that the defendant, Blake, never appeared to contest the petition for the organization of the Sny Island Levee Drainage District, organized in 1880, nor to contest the assessments made by the jury, and that thereby he had lost whatever rights he may have had in that regard, and that it was too late to question those proceedings upon an application for judgment against the land for taxes or assessments. In that case, we are compelled to admit that we were wrong, that the Supreme Court of the State of Illinois say so, and what they say is law, and we must also say so, notwithstanding we may think it is not good law. But a careful consideration of that case clearly shows that the court not only did not decide any question as to the validity of the old levee district organization in 1871, nor the validity of any contracts made, indebtednesses incurred, nor bonds issued, but the reasoning or dictum of the court in that case do not indicate or intimate that there was a valid or-

ganization under the act of 1871 of this old levee district, nor that the commissioners had power to make contracts, create indebtedness, nor issue bonds; but in the cases of *Webster* v. *The People* and *Updike* v. *Wright*, the Supreme Court of the State of Illinois do hold that this old levee organization, for the purpose of constructing the levee, creating indebtedness and issuing bonds, was without authority of the law, and was not authorized either by the Constitution or by the drainage act passed by the legislature in 1871; that the bonds issued and the assessments made are void.

From the above we think it is plain that the bonds involved in this litigation are absolutely void and can not be collected or enforced against any of the defendants in this case, either in a court of law or a court of equity.

II.

Counsel for appellants says that notwithstanding the Supreme Court has held the bonds involved in this case were issued without authority of law and are void, the Federal court should ignore the decision of the State Supreme Court, and render a decision in accordance with the view taken by him, regardless of the holdings of such Supreme Court. We respectfully differ with him. We think that the cases cited in appellant's brief are not applicable to the case at bar.

The case of *Town of Elwood* v. *Marcy*, 92 U. S. Rep. 289, construes the statute of the State of Illinois in a chancery suit concerning municipal bonds, and the court say, on

page 294: "We are not called upon to vindicate the decision of the Supreme Court of the State of Illinois in these cases, or approve the reasoning by which it reaches its conclusion. If the questions before us had never been passed upon by it, some of my bretheren who aggree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void because the laws which authorized their issue were in violation of a peculiar provision of the Contsitution of Illinois. We have always followed the highest court of the State in its construction of its own Constitution and laws. It is only where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action, the first decision, and rejected the last. This has been done on the grounds that the rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the courts; but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.

"There has been no conflict of judicial opinion in Illinois upon the controlling question in this suit, but, on the contrary, a settled uniformity. As these concurring decisions of the court of last resort in that State are grounded on the construction of its Constitution and statutes, it is the duty of this court to conform to them."

In the case at bar, the Supreme Court of the State of Illinois, in *Updike* v. *Wright* and *Webster* v. *The People*, have construed the Constitution and the statute as to drainage organiziation, and have expressly held that this drainage organization was not authorized by either the Constitution of the State nor the statute of the State, and that the commissioners had no power or authority whatsoever to issue the bonds involved in this suit nor to have assessments made against the land and collected for the payment of any bonds or interest. There is no decision in any case by the Supreme Court of the State of Illinois that modifies, changes or overrules the decisions in these two cases, consequently we apprehend the court will hold in conformity with the decision of the Supreme court of Illinois in construing the Constitution and statutes; that the bonds involved in this suit were issued by the commissioners without authority of law, and are absolutely void.

The court, in the case of *The Town of South Ottawa* v. *Perkins*, (Ill.) 94 U. S. 260, held the law to be the same as in the above cases.

As the counsel for appellants stated his position in the Court of Appeals, I assume that he will also take the same position here in his argument as in the Court of Appeals. On page 71 of appellant's brief, counsel says: "I am advised by my associate, General Palmer, that Judge Drummond was decidedly of the opinion that the decision of the State court of Illinois was not binding upon him, and that the drainage act was valid and that the assessments thereunder, if regular-

ly made in conformity with its provisions, were subsisting liens upon the lands assessed; certainly under no other view of the law could we have rendered the decree of March 13, 1879, and July 7, 1880. All questions concerning the validity, in general, of these assessments were settled and conclusively determined in complainants' favor by those decrees. The court preserved the right of the individual defendants to show, if they were able, why their particular lands should be excepted from the general rule. To this end and for this purpose only, was any supplemental bill provided for in the decree." We do not understand the law to be as insisted upon by counsel for appellants. My understanding of the law is that, interlocutory decrees are not binding. They are not final and can not be appealed from, and may be changed, modified or annulled by the court at any time before final determination of the case. The court will observe that, in the interlocutory order mentioned by counsel (see Record, pp. 439-440), there was simply a decree as to the amount due upon the bonds to the complainant and others, and that "the above amounts are found due, *without prejudice*, and further that the sum of money so found to be due are a lien upon the assessments made under the order of the County Court of Pike County upon the lands described in bound book Exhibit A." The court simply decreed what amount was due upon the bonds and that the bonds were a lien upon the assessments, and that the amounts found due were *without prejudice*. At that time, there were only three defendants, Messrs. Jones, Wheelock and Westlake, who were commissioners when the levee was constructed. None of these defendants were parties to this

suit, and were not brought into this suit until nearly nine years afterwards, and counsel says "to this end and for this purpose only, was any supplemental bill provided for in the decree." If this is true, Mr. Palms, knowing that this levee had broken, and in many places great sections of the levee had washed out, and that the lands then were in as bad or worse condition than before the levee was built, why did he remain silent and file no supplemental bill, while there was an amendment to the Constitution of the State being voted upon in 1879, and a new drainage act passed by the legislature of Illinois in 1879, conforming to the amendment to the Constitution, and a new levee and drainage organization formed under such law, and that it took possession of this levee in 1880; that hundreds of thousands of dollars was raised by such new organization, by assessment upon the lands, with which to rebuild, reconstruct and repair this old levee bed? This leave was given to file this amended or supplemental bill to bring these defendants in 1880; Mr. Palms lived until 1886, more than six years after leave was given to file this supplemental bill, but never filed the same, nor did his executors until 1889. In the meantime, the then landowners, knowing of the decision in the case of *Webster* v. *The People*, in regard to the old levee, and no further steps being taken in this case, supposed the whole matter had been settled by the courts, and they were selling lands to others, who, if they knew anything about it, learned the same facts; many of them died, leaving children to inherit their lands, with the same understanding, and, after waiting all these years and finding that the new levee organization, by persistent effort;

the expenditure of hundreds of thousands of dollars raised by assessments upon the lands; fifty thousand dollars from the government of the United States, the location of the levee changed in many places, gaps were rebuilt and refilled, the levy repaired and built several feet higher than it had ever been before. And after Mr. Palms, remaining quiet during all these years of his lifetime, and the landowners believing, as I have stated. After Mr. Palms' death, the executors filed their supplemental bill or bills, in the nature of a bill of review or revivor, and bring these defendants into court, the great majority of them having obtained their land since 1880, and that a lien be enforced against the lands to pay the bonds which had been declared invalid and issued without authority of the law by the Supreme Court of the State.

III.

If the bonds are valid or could be collected, appellants have no standing in a court of equity, as we understand the law, but would be compelled to resort to a court of law. Their bonds were registered with the auditor of the State of Illinois, and each year it became his duty, before the time of settlement of the county collectors of State taxes, to make out and forward to the several county collectors of the counties in which the assessed lands may be situated, a statement of the amount of the assessment collectible in that year, that may be required to pay the interest upon such bonds in that year, and insure the payment of the principal of said bonds out of such assessment, and the county collector should collect the same and pay into the State treasury to the credit of the com-

missioners, which shall be held and paid out by such treasury, as provided (Record pp. 405-406). If the bonds can be collected, what was there to prevent complainants from recovering a judgment in a State court or Federal court, and then if the officers refuse to do their duty, the court would, by mandamus compel the auditor to certify the assessment and the collector to collect the same and pay to the State treasury, and the State treasury to pay the judgment or judgments. If the bonds are valid, that could be done, and a court of equity, as I understand the law, would have no jurisdiction of the cause.

IV.

The bill and amended bills in this case, pray that the court may declare the bonds a lien upon the assessments; that the court will determine the amounts due upon the bonds, and the amounts due on the several assessments made against and upon each tract of land described in the pleadings and exhibits; and the proposed amounts of such assessments upon each tract of land necessary to pay the amount of the principal and interest now due upon the bonds and coupons of the complainants and others; * * * and that each of said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the owner or some other person shall, within a day limited, pay such amount, with a just proportion of the cost of this suit, and further prays for the appointment of another commissioner, or of a receiver. (Record pp. 45-46).

I believe there is no allegation in the bill that the auditor has failed or refused to comply with the duties devolving upon him, or the county collector to perform the duties devolving upon him. The commissioners had nothing to do with certifying or collecting these assessments. They had not refused to perform any duties devolving upon them. Although not required by the drainage act, or law, after these bonds were registered to do anything to enforce the collection of the assessments, the commissioners did employ eminent counsel, and use every effort and means to aid the county collector to enforce the collection of these assessments in the mode provided by the statute; and after the decision in the case of *Webster* v. *The People*, used every endeavor to obtain a rehearing in the State Supreme Court, but failed.

If the bonds were valid, or collectible, there was a complete mode provided for the collection of the assessments. There were officers in office who should do this work; they were ready and willing to do it; but the law authorizing the construction of the levee and the issuing of bonds had been held unconstitutional and void, and that the whole proceedings, in organizing the district and issuing the bonds was in violation of the Constitution, and the statute, by the Supreme Court of the State, and these officers could do nothing. Consequently the bondholders came into the Federal court and asked the court to ignore the decision of the State Supreme Court, and appoint some one to collect the assessments or to take an accounting

and find what each landowner should pay, or each tract of land should be assessed, and collect the same and pay the bonds and coupons.

Counsel for appellants says, in effect, the decision of the Supreme Court of Illinois in the case of *Updike* v. *Wright* and *Webster* v. *The People*, has declared the old drainage organization, and all proceedings under it, void and of no effect; that the commissioners had no authority or power to construct the levee and create an indebtedness for its construction, or to issue bonds to pay for its construction, or to issue and sell bonds to obtain funds to pay for its construction; hence, they must come into the Federal court on the equity side, and ask the Federal court to enforce the collection of the assessments, and appoint some person to do so, and to ascertain how much each tract of land was benefited by the construction of the old levee, and what each tract of land should be assessed to pay the bonds (void bonds), and collect such assessment and pay the bonds and pay the interest. If this is not the position of the counsel for appellants, why should not complainants be relegated to the State courts to compel the collection of the assessments and payment of money in the mode prescribed?

This brings us to the question: Will the Federal courts appoint a person to make or levee an assessment or tax, or to collect the tax, as asked in the supplemental bill in this case? I understand the law to be that the courts will not do so. This question is not a new one in the

United States courts. It has been fully settled by the Supreme Court of the United States in many cases, some of which are as follows:

*Thompson* v. *Allen County* (Ky.), 115 U. S. Rep. 550.

*Norton* v. *Shelley County* (Tenn.), 118 U. S. Rep. 425.

*Rees* v. *Watertown* (Wis.), 86 U. S. Rep. 107.

*Barkley* v. *Levee Commissioners* (La.), 93 U. S. Rep. 258.

*Heine* v. *Levee Commissioners* (La.). 19 Wall. 86, U. S. Rep. 655.

*Marsh* v. *Supervisors* (Ill.), 77 U. S. Rep. 676.

The case of *Thompson* v. *Allen County, supra*, contains a thorough and extensive discussion of the question, and the court analyzes and discusses many of the former decisions of the court on that question, and, although there was a dissenting opinion by one of the eminent jurists, his dissenting opinion was based upon the ground that the debt was valid, so held by the State court, a judgment was rendered, execution had issued, and was returned "no property found." The officers had been compelled by mandamus of the State Circuit Court to levy the tax; the tax had been levied and was ready to be collected, but no person would qualify as collector to collect the tax; hence, the court should appoint some one to col- the tax. The majority of the court held, however, in that case, that the Federal court had no power to appoint a person to collect the taxes, even under those circumstances. The court cites some of the cases above referred to, and

others of the United States Supreme Court holding the same way. Yet counsel for appellants insists that the Federal court should empower or authorize some person appointed by the court to collect assessments, held uncollectible by the Supreme Court of Illinois, or to appoint some one to equalize and levy and collect assessments, against the various tracts of land in the levy district, to pay the bonds of the complainants. As we understand the law, this will not be done by the court.

The case of *Thompson* v. *Allen County*, *supra*, was a bill in chancery, filed in the Circuit Court of the United States for the District of Kentucky, to enforce the collection of a tax to pay two judgments at law, on coupon bonds, and issued by the county to pay subscriptions of stock of the Cumberland & Ohio Railroad Company, and as no one would qualify to collect the tax, the aid of a federal court on the equity side was appealed to. The difference in that case and the case at bar is, there the bonds were valid, so held by the State court, and the tax had been levied; all that was needed was for some one to collect the tax. The court refused the aid asked, and held that it had no power to appoint any one to collect the tax, but that the complainants must look to the legislature of the State, if the State courts had not the power to enforce the collection. After reviewing the facts and authorities cited on pages 559 and 560, the court say: "The difficulty is that no power exists in either court, to fill the vacancy in the office of tax collector; and the case of *Lee County Supervisors* v. *Rogers*, 7 Wall. 175, where the

laws of the State of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it had ever been done, shows that without such legislative authority it can not be done.

"It is the duty of the marshals of the Federal courts and the sheriff of the State courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for awhile Would that authorize the court of equity of the Federal or state government to appoint a sheriff or marshal? or to appoint a receiver to levy the execution? or, if it had been levied, to sell the property, collect the purchase money, and pay it to the plaintiff? If this can not be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or, *what is still less appropriate, appointing a receiver, and endow him with that power?*

"To appoint a marshal or sheriff to execute the process of a court, to enforce the judgment of that court, is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment by a court of chancery, of an officer to execute the process of a court of law. The appointment of special masters or commissioners to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject-matter of the suit.

"Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State, under which alone, this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

"It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose by the justices of the County Court who levied the tax. The Court of Appeals, construing this statute, which was in existence when the bonds were issued, holds that no officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a court of chancery can not appoint such an officer or exercise this function of tax collector. *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254."

There is no decision of the Supreme Court of the State of Illinois that holds different from the above, that I know of. Therefore, as I understand the law, the Federal court will not appoint any one to either levy and equalize the assessment on the lands of the defendants or any of them, or to collect the same, or to even appoint a person to collect the assessments levied under the old drainage organization, by the jury, even if the bonds were valid and the assessments equitable.

V.

**The Supreme Court of Illinois having held that the old levee organization was without authority of law, and that the commissioners had no power or authority to create an indebtedness to construct or build the levee, or to issue bonds to construct or build the levee, or to issue and sell bonds to procure funds to construct and build the levee, that all assessments under the proceedings in the Pike County Court were void, and could not be collected, complainants come into the Federal court and file a bill for relief, and after alleging the various steps and proceedings from since long before the passage of the drainage act of 1871, by the legislature of Illinois, to the filing of the supplemental bill, bill of review, or bill of revivor, variously called, and the amendments thereto, allege that Mr. Palms, relying upon certain facts, purchased bonds of the levee commissioners and that the levee commissioners, with the full knowledge of all of the then landowners, out of the moneys advanced by said Palms, and other purchasers of said bonds, constructed said levee with such moneys.**

Upon this allegation the evidence was all taken, and showed without question that Mr. Palms never bought a bond of any of the levee commissioners nor advanced a cent of money, but that after said levee had been constructed, he bought the bonds of Heffron and others, bondsmen of Skelsey, Fuller and Pierce, the contractors to whom the bonds had been delivered in payment for the construction of the levee. Having failed to prove that allegation, when the case was called for trial November 5, 1895, by leave of court, that allegation was eliminated from the bill by

the amendment, "*the bonds were bought of the contractors*," and the cause was tried upon the bill as so amended, the answer and the evidence taken.

Counsel for appellants, as I understand his argument, does not directly insist upon the complainants being subrogated to the rights of the contractors or their bondsmen to whom the bonds were delivered in payment for the levee they had built and constructed; but with admirable zeal and ingenuity, counsel assumes that if the law under which the bonds were issued was unconstitutional, and that the commissioners had no power to issue the bonds, that the defendants are estopped from setting up such unconstitutionality as a defense; and counsel's argument on the question of estoppel is based upon the assumption that the present bondholders are in the same condition as the contractors would be if they were the complainants in this cause; or that the commissioners and the landowners induced the present owners of the bonds or their testator to purchase them and advanced the money to the commissioners with which to construct the levee, and that, therefore, having received the money from the purchasers of the bonds, and having stood by and permitted the commissioners to build and construct the levee with the money advanced by Mr. Palms, with their knowledge, they should in equity, pay the bonds, or all the lands embodied in the levee district should contribute to the payment of the bonds.

As I understand the law, the complainants can not, in this case, invoke the doctrine of subrogation; that is, they

can not claim that the contractors or their bondsmen, who took the bonds in payment for building and constructing the levee, by reason thereof would have an equitable lien on either the land or lands in the district, if they were the complainants here, and, therefore, Mr. M. Palms having bought the bonds of such contractors or their bondsmen, complainants have the same rights or equities that the contractors or their bondsmen would who did the work and took the bonds in payment therefor, were they the complainants. As has been stated heretofore, neither the commissioners, nor any of the then landowners asked Mr. Palms to buy bonds of them or to furnish money with which to construct the levee, or to aid in its construction. The contractors and their bondsmen had constructed the levee as it was left, and took in payment for the same, these bonds in suit. No representations, false, fraudulent, or otherwise, were made by any of them to induce Mr. Palms or any other purchasers to buy these bonds, as shown from the evidence; but when the bonds were offered for sale by Mr. Heffron, one of the bondsmen for the contractors, Mr. Palms, sent his attorneys to Pike County, to examine and investigate all of the proceedings in relation to the act authorizing the organization of the levee district, the appointment of commissioners, the assessments by the jury and the issue and registration of the bonds; and, upon the opinion of his attorneys as to the validity of the bonds, which opinions are in the record in this case on pages 454–458, he purchased the bonds, for none of which he paid to exceed ninety cents on the dollar. He bought the bonds upon the market upon the advice of his

attorneys that they were valid, and not as alleged, in the bill, that he was induced to buy them by representations of the commissioners or any of the landowners. There is no evidence whatever to sustain that allegation; he bought them on the market on speculation, and this case is directly in line with the case of

*Ætna Life Insurance Co.* v. *Middleport*, 124 U.S. Rep. 534, in which case there was a thorough discussion of the doctrine of subrogation in all its branches, and a review of the former decisions upon that question. In that case the town of Middleport was authorized by law to vote a subscription to induce the building of the C., D. & V. Railroad, and to levy taxes and collect the same to pay such subscription. The subscription was voted to the amount of $15,000; the road was built and the money due, but no money on hand with which to pay it; the officers issued bonds for the amount and delivered the same to the railroad company in payment of such subscription; the railroad company offered the bonds for sale upon the market, the same as was done by the contractors or their bondsmen in this case, and the Ætna Life Insurance Company purchased the bonds, the same as Palms did of the contractors or their bondsmen in this case, that had been delivered in payment for the work done in constructing the levee.

The State court held that the bonds were void, issued without authority of law, and that no tax or assessment could be levied or collected with which to pay the same. The Ætna Life Insurance Company then filed a bill in the United States Court for the Northern District of Illinois,

claiming that it was or should be subrogated to the rights of the railroad company, and hence, as the town was authorized to vote the subscription and collect the tax to pay it, and as the railroad company on the strength and credit thereof had built the road, and that, although the bonds were void, the town of Middleport, having obtained the railroad and all the benefits to be derived from the railroad, had such rights that a court of equity would enforce, and insisted that it, having purchased the bonds from this railroad company, should have the same equities that the railroad company had. The court held that it had no rights which it could enforce; that the law of subrogation could not be applied to that case; and after a full discussion and review of the cases of

*Otis et al.* v. *Cullem*, Recv., 92 U. S. Rep. 447;
*Lambert* v. *Heath*, 15 Meeson & Welsby, 486;
*Litchfield* v. *Ballew*, 114 U. S. Rep. 190,

on pages 547–549, the court say: "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that being forced, under such circumstances, to pay off the debt of creditors who had some superior lien or right to his own, he could for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff

in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

"But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

"These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation, extinguished by a payment made by a third per-

son, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another. * * *. It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges of mortgages, being obligated to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.

Sheldon on Subrogation, Secs. 2, 3.

"In section 240, it is said: 'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.'

"This is sustained by a reference to the case of

*Shinn* v. *Budd*, 14 N. J. Eq. (1 McCarter) 234.

*Sanford* v. *McLean*, 3 Paige, 117.

*Hoover* v. *Epler*, 52 Senn. St. 522."

And also on page 551, the court further say: "The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the code of that State is in the main founded on the civil law from which the right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the Appellate Court of the State of Illinois, *Suppiger* v. *Garrels*, 20 Bradwell App. Ill. 625, the substance of which is thus stated in the syllabus:

"'Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, if he pays the debt, a mere volunteer.'

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find any thing contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's endorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action."

The above case is exactly like the case at bar. It was a case where the bonds were held to be void; the purchas-

ers of the bonds filed a bill in a court of equity to enforce a lien for the benefits derived from the construction of the railroad, for which and to which these bonds were delivered, and the court denied their right to any aid or relief whatever. The only difference in the two cases is in favor of the case at bar. In that case the town was authorized to vote the subscription and levy and collect a tax to pay it; in the case at bar, as held by the State Supreme Court in *Webster* v. *The People*, the levee organization was not authorized to construct the levee, nor to issue bonds therefor, nor to levy or have levied assessments with which to pay the same, but all acts done were in direct violation of the Constitution and the statute.

Other counsel for other appellees have thoroughly and ably discussed the question of estoppel in all of its branches, and I will add but briefly to them.

Bigelow on Estoppel, 5th Ed. 557-558, states the law to be:

"In order to justify the interposition of equity in the case mentioned it is necessary to establish, not only the fact of misrepresentation or concealment, but also that it has been in a matter of substance or of importance to the interests of the other party, and that it has actually misled him. If the misrepresentation was of a trifling or immaterial thing, or if the party alleging it did not in fact trust in it or was not misled by it or if it was vague or inconclusive in its nature, *or if it was a matter of opinion of fact equally open to the knowledge of both parties, in regard to which neither could be presumed to trust the other;* in these and the

like cases equity will not grant relief. We shall see in the course of the present chapter that the legal doctrine of estoppel by conduct is founded upon similar considerations. We now call attention to a few of the leading cases in which the general nature of this particular phase of estoppel by conduct is defined; and we shall then pass on to a de tailed examination on the subject," citing, among other cases,

*Drexel* v. *Berney*, 132 U. S. Rep. 241.

in which case the court say: "It is held that to justify resort to equity, in respect of this 'equitable estoppel,' it is necessary that there should be some ground of equity apart from the estoppel itself; in other words, this estoppel in itself is purely legal. *There cannot be any estoppel, according to some cases, against showing an act made void by statute.*"

Story's Equity Jurisprudence, 13th Ed., Section 1544, states the following rule: "This doctrine of estoppel *in pais* in ordinary cases grows out of a fraudulent purpose and a fraudulent result. If indeed the element of deception is wanting, there is no estoppel, as, if both parties were equally cognizant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception and change of conduct in consequence, in order to estop the party from showing the truth."

It is apparent from the evidence in this case that the commissioners and all parties who took part in the pro-

ceedings to organize the levee corporation; to levy assessments; to construct the levee; and to issue the bonds, as well as Mr. Palms and his attorneys, and other purchasers of the bonds, were mistaken as to the law and as to the validity of the bonds; but who was at fault? The landowners, who wanted the levee, supposed that they would have the benefit and protection of the law in building and constructing and keeping the levee in repair, and that their lands would be greatly enhanced in value and benefited; Mr. Palms purchasing the bonds, and his attorneys, supposed that the bonds were valid and could be collected in the mode and method provided by law; but they were mistaken; Mr. Palms lost the money he paid for the bonds; the levee proved to be no protection to the lands; the law was proved to be invalid by the Supreme Court of the State of Illinois; they had no means to raise money with which to keep the levee in repair; there was no law they could invoke to aid them in doing so. They, believing the law to be valid and that money could be raised under it to keep up and maintain the levee, expended hundreds of tnousand of dollars in putting the lands in cultivation, opening them up, and building houses, fences and other improvements thereon; but by the time of the rendering of the decision in the case of *Updike* v. *Wright* and *Webster* v. *The People*, the levee broke in many places and washed away all of their improvements and the lands were of no more value than before any levee was built and commenced. All were mistaken and all lost their money; and under the above authorities, how could the complainants enforce the collection of

void bonds, against the lands in this levee district? Was Mr. Palms mislead by anything done or said by the commissioners or the landowners that induced him to buy the bonds? No, there is no evidence tending to show that fact. He was advised by his attorneys that the bonds were valid, and upon that he purchased them. He and complainants are in the same condition as many other persons buying void bonds upon the market. The case also of

*Lambert* v. *Heath*, 15 Meeson & Welsby, 486,

is applicable here. The court say in that case, "Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they can not have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to see, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he can not occupy the vantage ground upon which it would have placed him." P. 449.

If counsel for appellants takes the position that they should have a lien upon the levy itself, the case of

*Litchfield* v. *Ballou*, 114 U. S. Rep. 190,

is applicable. In that case, the city of Litchfield had issued bonds to construct water works, and issued them beyond the limit provided by statute; the court denied the lien of the complainants upon the water works, and one of the grounds upon which the lien was denied was that other money than that of complainants had helped to build the water works. In the case at bar, about three miles of this levee was built and is being maintained by the Wabash Railroad, the C., B. & Q. Railroad, and the Chicago & Alton Railroad; the land owners under the trust deeds mentioned in this case expended thousands of dollars in trying to repair this levee; the new levee organization has expended hundreds of thousands of dollars in changing the location of the levee, raising the levee higher, and wholly rebuilding the levee in many places; also the government of the United States appropriated and expended $50,000 in obtaining a location for a portion of this same levee, building it and making improvements upon it. Applying the doctrine of *Litchfield* v. *Ballou* above, complainants could have no lien upon the levee. The earthwork was constructed partly with the money of others, and of the government.

VI.

I have briefly mentioned the question of the interlocutory order heretofore. How can this interlocutory order of

1880, finding so much due on the bonds "*without prejudice, and that the complainants have a lien on the assessments,*" and permitting complainants to "file a bill or bills, original or supplementary, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid," bind these defendants? Why should not this supplemental bill, or bill of review or revivor, as it is variously termed, have been filed sooner? How can these defendants who were not parties to the suit at that time, be estopped from setting up their defenses as soon as they are made parties? Most of these defendants, if they had ever heard or this suit having been brought, had heard of the result of the case of *Webster* v. *The People*, and supposed that decision had ended all action upon the bonds and the enforcement of the assessments, and that the whole matter had ended. One of the commissioners (Capt. Westlake) died in June, 1892, the other two commissioners heard nothing more of the suit, and nothing was done or proceedings taken for more than eight years. In the meantime the old levee had virtually become a thing of the past; it was and had been no protection for some years; the lands had depreciated in value until they were worth but little, if any, more than before any levee was built. The land was in as bad condition for agricultural and sanitary purposes as before the levee was built. The owners were hundreds of thousands of dollars worse off than they were before the levee was built; they supposed that they had lost all of their money expended in putting the lands in cultivation, and buildings and

improvements thereon, and that the purchasers of the bonds had lost their money, and that the whole matter was done with. Mr. Palms seems to have thought so too, or he would have filed this supplemental bill during his lifetime. However, after the amendment of the Constitution of the State in 1878, authorizing the legislature to enact laws to enable landowners to organize and build and construct *levees* to reclaim lands from overflows from rivers; and after the legislature had enacted the law of 1879, a petition in 1880 was presented to the County Court of Pike County, Illinois, by certain owners of land embraced in the old district, to organize a levee and drainage district under the new law, and take this old bed of a levee and reconstruct, rebuild, repair and keep up and maintain the same; and under such petition the Sny Island Levee Drainage District, the present organization, was perfected, and hundreds of thousands of dollars were raised by assessments upon the land benefited in the district for the purpose of rebuilding, changing the location of, repairing and keeping up this levee. There were many breaks in the levee; from year to year, lands would fluctuate in value, go up and come down, as the levee would break; tenants would be driven out, new assessments would be made, the levee would be repaired, and this condition of things continued. Still, Mr. Palms, in his lifetime, never had a supplemental bill filed, nor did his executors after his death until 1889, more than eight years after leave had been given to file the same; and the levee having become somewhat of a protection to the lands from overflow from the river, but not to the extent, however, of the money expended under the new or-

ganization in changing the location, rebuilding, repairing and maintaining the same, the complainants, by their counsel, filed this supplementary bill and by leave of court made various amendments thereto until the hearing of this case in November, 1895. As between all of these defendants and complaints, upon which side is justice, equity and right? If it should be held that the bonds can be enforced and collected in any manner, it would amount to a confiscation of all of the lands of these defendants, after they supposed all of the litigation over the bonds had ended, and they had expended almost the value of their lands in paying assessments to build and reconstruct, raise and change the location of the old levee bed, and were led to do so by this suit remaining in abeyance during all these years and no steps being taken.

As I understand the law, the doctrine of *lis pendens* does not apply to this case. After the decision in the case of *Webster* v. *The People*, there was no corporation with Messrs. Jones, Weelock and Westlake as commissioners in fact. The Supreme Court in that case had decided that all proceedings of this *quasi* corporation were void and without authority of law; that the construction of the levee as an independent work to reclaim lands from overflow from the river, and the issue of bonds to pay for the construction, and all assessments against the lands, were unauthorized by the Constitution and the statute; that the assessments could not be collected. The commissioners were not vested with any power—they were commissioners in name only from that time on; they being the only defendants in this case at that time, and they, being shorn of all power

and authority by the decision of the court in that case, could do nothing to bind the landowners, or to effect their rights, or to effect the land in the old levee district.

If complainants abandon the position that the bonds are valid, or if the court here should hold so, and complainants proceed upon the theory that they have an equitable lien upon the lands in the district or upon the old levee bed itself, or an equitable action against the landowners, present defendants, how could the order of the United States Circuit Court in this case, in 1880, bind the landowners or affect the lands when none of them were defendants, and were not made so by the supplementary bill for more than eight years after such order was entered? If the commissioners were representatives of the landowners and an order or decree of court against Messrs. Jones, Wheelock and Westlake could bind these defendants and affect their lands, what was the necessity to file the supplemental bill and make a thousand defendants? Why not avoid such enormous expense by continuing proceedings against Messrs. Jones, Wheelock and Westlake, as commissioners? The reason, I think, is apparent; no order or decree of court against Messrs. Jones, Wheelock and Westlake, as commissioners, or otherwise, could bind either the land or the landowners. Messrs. Jones, Wheelock and Westlake, having no power or authority, and no right to bind the landowners or the lands, any decree against them could not affect the lands, it therefore became absolutely necessary to give the court jurisdiction, to bring all of the present defendants into court; they not being parties to

the suit when such order was entered under the authorities cited, they could not in any manner be affected by such order.

VII.

Let us suppose, for the argument of the case, that the complainants do have some rights or equities against the lands benefited by the building, construction and maintenance of the levee. What equity or rights can complainants have against the land, or the owners of the lands in the lower end of the levee district? As heretofore stated in my statement, this levee district is about fifty-two miles long, three to five miles wide, and before the levee was built a branch of the river forming what is called the Sny or *Sni Earte* left the river near the upper end of the district and extended out into the lands, as indicated by the map in the printed record here, with numerous outlets to the river, the main outlet being at the lower end of the levee district—Hamburg bay; that the numerous large creeks coming down from the uplands extending through the bottom lands were emptied into this Sny, and from there into the river; but the building and construction of the levee cut off these outlets and also the inlet. Before the building of the levee, this Sny was a rapid running stream of from one to three hundred feet wide but, as shown in the evidence, since the building of the levee it has almost completely filled up; the creeks have no outlet to the river; all waters from these creeks are spread out over the lands adjoining them, or are forced through the levee district to the lower end, that be-

ing the only outlet, causing vast bodies of water to flow over these lower lands, which, before the building of the levee, emptied into the river at various places. Also, with a levee of this extent and height, when the waters in the river get high enough so as to inundate the bottom lands if no levee were there, the water backs around the lower end of the levee and covers the land of nearly one hundred of the defendants whom I represent, and others represented by other counsel for defendants, and during these times of high water and freshets the vast bodies of water coming down from the uplands into the lower end of the district, meets the back water, until at times the water has been three feet higher inside of the levee and over the lands in the lower end of the district than it has in the river. From the evidence of the witnesses, it is shown that a large portion of these lands have been completely destroyed for agricultural purposes, on account of the building and keeping up of this levee, which were worth from twenty-five to fifty dollars per acre before any levee was built. Suppose, for the sake of argument, that the money of Mr. Palms, and the other purchasers of the bonds, had built and constructed this levee, how could complainants have any remedy, right or equity against these landowners? Instead of their lands being benefited, they have been greatly damaged. See printed record of Z. T. Webster, the same Webster who is appellant in the case of *Webster* v. *The People*, so often referred to, p. 173; F. L. Zerenburg, pp. 175–177; Lemuel Long, 178, 179; Dr. J. S. Thomas, pp. 180–182; A. F. Furguson, 183–186; Frederick

Wiedman, 186,187; Dr. J. S. Thomas, 188–192; B. S. Jennings, p. 193; A. J. Lovel, pp. 193, 194; William Lovett, pp. 196, 197; M. J. Thompson, pp. 198, 199; James Ruyle, pp. 200, 201; John McLean, p. 202; and many others. Those having lands in that end of the district almost to a man opposed the drainage organization from the beginning, including the present levee system and organization. It must be conceded that complainants have no cause of action against those landowners, and why should they insist upon retaining those landowners in this suit, compelling them at great cost and expense, besides the worry and bother of going into court and proving facts that have already been so conclusively proven? I apprehend that complainants did not retain them as defendants so that they may come in by a cross action, and ask pay for the damages occasioned to their land on account of the building and constructing of the levee, from the bonds involved in this suit.

The allegation contained in the bill that the lands in the levee district, on account of the building of the levee, have been rendered of great va ue for agricu tural purposes, and greatly enhanced in value, can have no application to these lands, or to any other lands ying c ntiguous to the creeks running through this levee district; consequently, those lands have not been benefitted, but have been damaged, and upon the trial of this case in the Circuit Court, we think it should have been dismissed.

I am unable to reply to counsel for appellants or petitioners, as I have been so unfortunate as not to receive a

copy of his brief or any part of it, and have been compelled to anticipate what counsel may say, and in fact substantially use the same brief as in the Court of Appeals.

I would further call the Court's attention to the able and exhaustive opinion written and filed in this cause, in the Court of Appeals, and it will be observed that every question, being a number of them, which are fatal to the case of appellants, has been fully considered and supported by authority, by the eminent jurist who wrote the opinion, and upon either one of five grounds this cause should be affirmed; even if all but one should be reversed, either one of the grounds upon which the defense is based should affirm the case.

I respectfully insist not only that the great majority of my clients, who live in the southern end of the district and have been greatly damaged instead of benefited by the construction of this old levee, but all of the land owners in the leevee district, instead of being benefited, have been damaged, or nearly all of them, and that this cause should be affirmed and this litigation ended.

A. G. Crawford,

*Attorney for the Defendants represented by him.*

Jefferson Orr,

*Associate Counsel for same Defendants.*

Supreme Court U.S.
FILED
OCT 11 1901
Clerk

Filed Oct. 11, 1901.

# In the Supreme Court of the United States.

No. 38.

OCTOBER TERM, 1901.

MICHAEL W. O'BRIEN *et al.*, *Executors*,

*vs.*

JOHN G. WHEELOCK *et al.*

## ADDITIONAL BRIEF FOR APPELLEES.

ASA C. MATHEWS,
THOMAS WORTHINGTON,
HARRY HIGBEE,
W. H. H. MILLER,
*Counsel for Certain Appellees.*

The Hollenbeck Press, Indianapolis.

IN THE

# Supreme Court of the United States.

No. 38.

OCTOBER TERM, 1901.

MICHAEL W. O'BRIEN *et al.*, *Executors*,

*vs.*

JOHN G. WHEELOCK *et al.*

## ADDITIONAL BRIEF FOR APPELLEES.

The writer of this brief, who has been but recently brought into the case, desires to add a few suggestions to the brief for appellees—not, it is hoped, in the way of repetition.

### I.

*Even if valid such assessments not collectible in this suit.*

We want again to insist that these assessments, even if valid, would not be collectible in the United States courts, but, being liens purely statutory, must

be taken on the terms prescribed by the statute and can be collected only by the statutory method; and that the decisions cited by counsel for appellants are not to the contrary.

Section 29 of the act provides for the collection of these assessments as follows:

"SEC. 29. The commissioners, upon receiving such certified copy of such assessment, may proceed to collect the same, or any installment thereof, or they may certify such assessment, or any installment thereof, which they may be entitled to collect at the time, to the county clerk of the county in which the lands assessed may be situated, who shall extend the same, in a separate column, upon the proper tax-books for the collection of state and county taxes, and such assessment or installment thereof, so extended, shall be collected and enforced in the same manner as state and county taxes."

And Section 31 reads as follows:

"SEC. 31. When the commissioners shall have elected to collect any assessment or installment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or installment shall be due and uncollected, and as often as any installment shall become due and be uncollected at the time for making return of the tax books, for the collection of state and county taxes, next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any installment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of state and county taxes in the counties, or respective counties, where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioner(s)."

The statutes of Illinois provide for the collection of taxes by distress and sale, not by a suit in court.

Accordingly the supreme court of Illinois has expressly adjudged that a lien for taxes can not be collected by suit in a court of chancery.

*The People* v. *Biggins*, 96 Ill. 481.

In that case the court very broadly declares that all statutory liens must be enforced in the mode prescribed in the statute. In the opinion much stress is laid on the distinction between statutory liens, such as taxes, judgments, etc., and liens by contract. This is the general rule.

Cooley on Taxation, second ed., p. 449–450.

Nor has this court decided otherwise, as counsel for appellants assumes.

On the contrary, the proceedings in the cases cited by him in support of his contention were all based on statutes making the assessments collectible by suit in the courts.

Thus, in *Fitch* v. *Creighton*, 24 How. 159, on page 161, it is said:

"Each municipal corporation may, either by a general or special law, or ordinance, prescribe the mode in which the charge on the respective owners of lots, or lands, shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment, or decree, was required to be entered severally."

In *Idaho, etc.*, v. *Bradbury*, 132 U. S. 509, we find the following on page 515:

"The present suit was brought to enforce a mechanic's lien created by the statutes of the territory, which authorize the court in such a suit to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, 'in like manner, and with like effect, as in actions for the foreclosure of mortgages.' Idaho Code of Civil Procedure, sections 815, 826."

In *Hagar* v. *Reclamation District*, 111 U. S., page 701, on page 711, Mr. Justice Field, speaking for the court, says:

"The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No. 108* v. *Evans*, 61 Cal. 104."

So in *Jones* v. *Great Southern, etc.*, 86 Fed. Rep. 370, it is shown in the statute quoted, section 3185a, on p. 371, that the lien was to be enforced by a suit in court.

If *New Orleans* v. *Warner*, 175 U. S. 120, decides or intimates anything upon this question, it is not apparent.

Of course, no lawyer will question that when a statute gives a right enforceable by suit in equity in a state court, other conditions of jurisdiction being

shown, the right may be enforced by like suit in the federal court.

But that is not this case. Here we have an attempt to collect by suit in equity in the federal court a statutory tax or assessment which the statute says shall be collected by the statutory method of distress and sale.

We submit that, on principle as well as under the decision of the supreme court of Illinois in the Biggins case, *supra*, and the decisions of this court cited in our original brief, pages 47 to 55, these assessments, even though valid, are not collectible in this suit.

## II.

*Act invalid because it leaves amounts and times of payment of assessments to discretion of court.*

Although it is so clear as to be scarcely open to question that the act of the legislature of Illinois of April 24, 1871, is invalid, for the reasons given by the supreme court of Illinois in *Updike* v. *Wright*, 81 Ill. 49, and *Webster* v. *The People*, unreported, and by Mr. Justice Harlan in this case, we submit that the act as to these assessments is invalid for still another reason.

Passing by the other provisions of the law, and not stopping to argue whether this act attempts to confer a legislative function on a judicial tribunal, we ask especial attention to section 27 of this statute.

"SEC. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work, other-

wise the whole amount of such assessment shall be payable immediately upon such confirmation, and shall be a lien upon the lands assessed until paid."

That is, the legislature attempts to delegate to the court the power, in its *discretion*, to fix the amounts and times for the payment of the assessments. It is submitted that this could not be left in the discretion of any tribunal, but must be fixed by law.

It is certainly not necessary to argue that these assessments rest upon the taxing power, although it is true that for some purposes special assessments are not treated as taxes proper.

Cooley on Taxation, 416;
*Hagar* v. *Reclamation District*, 111 U. S. 701.

But it is essential to the validity of any tax or assessment that it shall be made under a law that is definite, certain, and leaves nothing to the discretion of the taxing officers.

Cooley on Taxation, pages 33 and 244;
*Barnes* v. *Dyer*, 56 Vt. 469;
*State Board* v. *Holliday*, 150 Ind. 216;
*Sears* v. *Street Commissioners of Boston*, 53 N. E. 876;
*State* v. *New Brunswick*, 38 N. J. L. 190;
*Charles* v. *City of Marion*, 98 Fed. Rep. 166, 168.

If this provision of section 27, that the court can "order the assessment of benefits to be paid in installments of such amounts and at such times *as will be convenient for the accomplishment of the proposed work be valid*, then different times and different amounts might be fixed by the court in each county in the state where such work should be undertaken. Nay, more; the

same court, for different improvements, might fix different amounts and times of payment in the same county; and, by the strict letter of the statute, different amounts and times might be fixed for different parties under the same improvement, though it could hardly be claimed that such action would be valid. That is, the assessment is made payable, not according to law, but in the discretion of the county court.

We submit this is at variance with every principle of taxation, and is at variance with the oft-quoted declaration of this court that "ours is a government of laws and not of men."

## III.

*Law can not be made by estoppel.*

The claim of a lien in this case by estoppel is a most remarkable one. The statute providing for a lien is unconstitutional, has been so adjudged, and, for the purpose of this contention of an estoppel, is conceded to be so.

But, it is said, some of these defendants encouraged the passage of this unconstitutional act; others encouraged the proceedings under the act; others have received the benefit of the work done while it was supposed the act was constitutional; and, therefore, all such parties, and all who are in privity with them with notice, are estopped to deny that as to them the statute was a good *law* and created a lien.

In the case of *Norton* v. *Shelby County*, 118 U. S. 425, page 442, Mr. Justice Field, speaking for this court, says:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection;

it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

*South Ottawa* v. *Perkins*, 94 U. S. 267;
*Wilkes County* v. *Coler*, 180 U. S. 506.

The situation, then, after the passage of the act of 1871, was as if no act had been passed. If no act whatever had been passed, would any lawyer contend that, by doing what these defendants did, a lien would have been fastened upon all this property?

By way of illustration, take the case of a mechanic's lien. It is purely statutory. Assume no statute upon the subject has ever been passed by the legislature of Illinois. A contractor with the knowledge of the property owner, for instance, proceeds to erect a house upon his (the owner's) lot. Having done so, he files a notice of an intention to hold a mechanic's lien and brings suit in court to enforce such lien upon the property for the amount of his expenditure. It is, of course, too plain for argument that no such lien could be maintained or enforced. But suppose that a statute has been passed which has been adjudged to be unconstitutional. It is, according to this court, precisely as if no statute had been passed at all. And, if that be so, it is equally plain that the lien can not be enforced.

The case of *Holcomb* v. *Boynton*, 151 Illinois 299, 300, 37 Northeastern 1031, is directly in point, and shows that the supreme court of Illinois denies the possibility of maintaining a statutory lien without a statute by means of an estoppel. In that case a statute had conferred upon the county court jurisdiction to enforce mechanics' liens. The necessary preliminary steps had been taken to entitle the contractor to his lien. A decree foreclosing the lien and ordering

the sale of the property had been taken. Subsequently to such decree the legislature repealed the act conferring the jurisdiction without any saving clause, and it was, of course, held that the proceeding could go no further in that court or under its decree. The party, however, in whose favor the decree had been taken, and the officers of the county court, did proceed to execute the decree. A sale was made by a special master, and redemption from this sale was made by one Boynton, the appellee, who was the owner of a judgment known as the Warren judgment. Boynton furnished the redemption money, and another sale was made at his instance after such redemption, and the property on such second sale was purchased by one Wild. After such second sale, a third sale was made at the instance of other judgment creditors upon their judgment. Thereupon, Boynton, the appellee, who procured the first redemption and had the sale on his judgment, filed his bill to enjoin a conveyance upon the third sale, upon the ground that the entire proceedings were void, by reason of the repeal of the statute as above set out. It was insisted, on the other hand, that he, Boynton, was estopped, by his action as heretofore set forth, to question the validity of the sale from which he redeemed, or to set up the repeal of the statute. The supreme court of Illinois decided otherwise, holding that several essential particulars of an estoppel were wanting: First, that there was no evidence of fraud; second, that the law was equally open to all parties; third, that there was no misrepresentation of facts, and where both parties are equally cognizant of the facts, both are presumed to know the law and there can be no estoppel.

In other words the supreme court of Illinois refused

to sanction the proposition that a law could be resurrected by estoppel. In the opinion it is said, almost paraphrasing the language of this court in regard to an unconstitutional law in the *Norton-Shelby Co. Case*, *supra*, "when a statute is repealed without such saving clause, it must be considered, except as to proceedings passed and closed, as if it had never existed." If a party may not estop himself to question the repeal of a statute and so resurrect it, then it is certainly preposterous to say that he may, by estoppel, *create* a statute.

Suppose one of these parties, who, it is claimed, has estopped himself to dispute the validity of the law in the case at bar, should do an act, such as filling up a drain or cutting the levee, as denounced in section 45 or 46 of the act of April 24, 1871, and, thereby, if the law were valid, subject himself to the penalties provided by sections 45 and 46. Would any lawyer have the hardihood to contend that, the statute having been pronounced unconstitutional, such party could be convicted and sent to jail, or fined five thousand dollars, because, notwithstanding the statute was unconstitutional, it was valid as to him by estoppel? In such case, if the statute were a law, he would be liable to those penalties. If he would not be liable, it would be because the statute is not law. And if those sections of the statute are not law, by what right or authority can this, or any other court, say that other sections of the statute are law?

Again, take this case, or take the case of street improvement liens, or the case of a mechanic's lien. In such case the statute declaring the lien generally makes a lien which is an incumbrance paramount to the rights of the wife of the owner. A sale under a decree enforcing such lien carries the entire title.

But suppose the mechanic's lien statute, or the street improvement statute, or this statute has been adjudged to be unconstitutional. By the general statutes of the state, it is not competent for the husband to encumber the interest of his wife in his property except by a deed or mortgage in which she joins. Yet the contention here is that by his own acts, with which she has nothing to do, he makes that to be a law which, as to everybody else, is not law, and thereby encumbers her property. He could not by any agreement that he might write or sign, or by anything that he might say, encumber her interest in the property to the extent of a dollar. But, according to the contention here, standing by with his hands in his pockets and not opening his mouth, but simply knowing that his property is getting some supposed benefit, he is able to do by estoppel what he could not do in any other way in the world.

Nay, more than that. These liens by statute take precedence over mortgages. If the statute is valid, the street improvement lien or the lien in this case would be slipped under a mortgage and take priority over it. The property owner could not, by any agreement that he could possibly make, accomplish any such result. The law has been declared to be unconstitutional and void,—in the language of this court, it is as "inoperative as though it had never been passed." And yet according to the contention of our opponents, the owner having only a naked equity of redemption, by simply standing by and getting for his property whatever supposed benefit may come in the way of improvement, does displace the mortgage and pass a lien underneath it which may take the entire property, leaving nothing for the mortgagee. Of course, he could do nothing of the kind by contract or

by any voluntary act on his part. If it be said the estoppel can not affect third parties, that is an admission that the estoppel does not make the law valid, but only goes to the personal obligation of the party standing by.

*It seems to us that* if statutes could be created in this way and have such far-reaching effect, legislatures might well be dispensed with.

What, then, is, and what is the extent and effect of, this doctrine of the creation of an obligation in such case by this doctrine of estoppel? It is respectfully submitted that, at the utmost, it is this much and no more. The property owner by standing by and assenting to the expenditure of money *upon his property*, may have estopped himself to deny an implied assumpsit to repay such expenditures. But he has not created a lien.

In order to create a mechanic's lien, several things are necessary.

*First.* A statute creating and providing for the manner of taking the lien.

*Second.* A contract express or implied on the part of the property owner to pay for the improvement.

*Third.* A compliance with the formalities required by the statute for the taking of the lien.

If the law exists and if the formalities required by the law have been complied with, then, if the property owner has stood by with knowledge, the promise to pay may be implied, and the property owner estopped to deny the same. But, without the law and without the compliance with the formalities it requires, the mere standing by, with knowledge, while it may create a personal obligation by estoppel, can not take the place of the statute and create a lien. As well say that, in such case, the property owner

has, by standing by, created and placed upon his property a mortgage.

So in the case at bar, conceding all that counsel for appellants claim as to the defendants standing by, and permitting the expenditure of *plaintiff's money* without objection, they would have estopped themselves to deny a personal obligation and nothing more, provided always the expenditure had been made on their property. A statutory lien can not be created without a statute. An estoppel in such case can go no further than a personal promise. And we suppose that, in the absence of a statute or any pretense of a statute, no one would assert that, if these people had orally promised that the holders of these bonds should have a lien upon their premises, such promise could be enforced as a lien in a court of equity. The difference between a statutory lien and a lien by contract is shown by the circuit court of appeals, in the sixth circuit, in *Richmond, etc.*, v. *Richmond, etc.*, 68 F. R. 105–109 and 110; also by this court in *McMurray* v. *Brown*, 91 U. S. 257–266, and by the supreme court of Illinois in Biggins case, *supra*. Moreover, complainants having attempted to obtain a lien by statute can not now rely on a contract or equitable lien.

*Vane* v. *Newcombe*, 132 U. S. 220–238.

And, whatever may have been said by any other courts, this court has not adjudged that a statute may be a law between A and B, and not a law as between B and C. On the contrary, this court has said:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according

to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

*Ottawa* v. *Perkins*, 94 U. S., page 267, repeated in
*Wilkes Co.* v. *Coler*, 180 U. S. 520.

Nor is there anything decided in *Daniels* v. *Tearney*, 102 U. S. 415, or in any case therein cited except the Kentucky cases, at variance with this view. All that was necessary to be decided in that case, and all that was decided, was that the defendants by giving the bond and getting the benefit of the stay provided for by the unconstitutional statute, had estopped themselves to deny, as against the innocent obligee, their personal obligation under the bond, that is, an implied assumpsit to pay the same.

In this view that decision is entirely in accord with the declaration of this court in *Norton* v. *Shelby County* and in the *Town of South Ottawa* v. *Perkins* and in *Wilkes Co.* v. *Coler*. Upon any other view it is directly at variance with the law as declared in those cases, and would be an adjudication that a document "purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in

another case and for another party; a law to-day and not a law to-morrow; a law in one place and not a law in another in the same state."

It is easy to understand how a party having received a direct benefit under an invalid contract may be estopped to deny a promise, express or implied, to pay for the same. But how any citizen can be estopped in a court of justice to assert the invalidity of a statute is not so easy to be understood. And especially is this so where, as in *Daniels* v. *Tearney*, the law and the contract under it are adjudged void because treasonable and contrary to public policy.

Suppose that in the Daniels-Tearney case, instead of providing that a bond should be given, the statute of Virginia had provided that, without any action on the part of the defendants, all executions should be stayed until the end of the war, and in the meantime such executions should be a lien upon all the property of defendants, not only as theretofore within the particular county, but everywhere throughout the state. The defendant got the benefit of the stay thus provided by statute and failed to pay the debt. After the war is concluded and the statute has been declared to be unconstitutional, could the lien thus provided for be enforced? The statute did not create a lien, because it was no statute. There was, therefore, no lien to be enforced. Is the fact that the defendant got a benefit under the statute to supersede the necessity for legislation and create a statutory lien?

This court is on record, over and over again, to the proposition that where two parties are in *pari delicto*, as where a corporation has made a contract *ultra vires* merely—there being no moral wrong—the courts will not help either party to assert any right under the contract, and either party may raise the question.

This is not out of favor to either party, since "the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

This is the language of Lord Mansfield in *Holman* v. *Johnson*, 1 Cowper 341, quoted with approval by this court in *Pullman Car Co.* v. *Central Transportation Co.*, 171 U. S. 150, 151.

According to the Pullman case and the cases cited therein and the Terre Haute case, 145 U. S. 393, this court refused to give validity by estoppel to an *ultra vires* contract, involving no turpitude on either side. Upon what principle or course of reasoning, then, where two parties have proceeded with equal knowledge of law and facts, each acting for personal gain, one to have his property improved and the other to invest his money at large interest enhanced by a large discount, is either to be estopped as against the other to plead that a statute has been declared void as offensive to the organic law of the state? Especially where, as here, the property owner is deprived in the main of the benefit of the law, wherein is such an estoppel equitable? Both parties act upon the same motive. Nay, more, on what principle is a whole system of unconstitutional lien law to be created and enforced by estoppel in the latter case, when in the *ultra vires* cases the contracts are held void

at the instance of either party, although the full consideration may have been received, and a recovery can be had, as in the Pullman case, not on the contract, but on a *quantum meruit* only?

Moreover, nothing is better settled than that, as against the statute of frauds, the receipt of the entire purchase-money by the vendor of real estate will not estop him to plead the statute, and will not take the case out of the statute. In such case the contract is voidable, and the vendee can only recover back his purchase-money. Is it not absurd to say that in such case there is no estoppel to plead the invalidity of a mere contract, while in the case at bar there is an estoppel to plead that there is no lien to be enforced, because the statute purporting to create such lien is at war with the organic law of the state?

The whole theory of such an estoppel is illogical.

No definition of estoppel can be found broad enough to cover such contention. In those definitions, always and everywhere estoppel is as to facts, not law. Law can not be made or unmade by admission, assertion or denial. In all the elementary books, no one can be found giving estoppel as one of the sources of the law. Constitutions, ordinances, statutes, customs, these and their like are the sources of law in constitutional government. But estoppels, assertions, admissions, agreements, never. These may make, establish and forever settle facts, but not law.

Doubtless, a party may in circumstances of confidence state the law and be precluded from afterward denying that he stated it truly; but in such case he would be so precluded, on the ground of fraud, because his statement was made under circumstances that warranted the other party to rely on his statement as a true statement of a fact within his knowledge and

of which the other party was ignorant. In such case the statement of the law is the statement of a fact in just the same way that proof of a foreign law is made by lawyer witnesses to a jury. But even in such case the estoppel could go only to the person. It could not make a mortgage or conveyance of real estate without a compliance with the requirements to that end; it certainly could not make a statutory lien without a statute.

The situation now as to the law can not be different from what it was when the levee broke and the law was declared unconstitutional in 1876.

Suppose one-fourth of the property owners had done the acts claimed to make the estoppel. One-fourth, then, according to appellants, were liable to assessment. One-fourth enough money could be obtained to pay for and keep up the work. But of what use would such a levee be. Of course an uncompleted and an unrepaired levee is no better than none. Are these owners of one-fourth of the lands to be assessed to make a part of a levee?

The truth is, this attempt by the courts through estoppels to resurrect dead statutes results, as such attempts to warp principles to prevent particular instances of supposed injustice always do, in making absurd and indefensible precedents. The legislature is forbidden to enact special legislation, but courts and juries by estoppel may make a different law for every different case; nay, different courts with different juries may make a different law for exactly the same case. Upon principle the law is supposed to be fixed, certain and known of all men. The contention here is that, as to these one thousand defendants, there are as many laws as parties in varying conditions. Commodities can be weighed and measured

only by fixed standards—pounds, and yards, always the same. So, alongside laws fixed and certain, facts may be laid, and human conduct fairly judged and regulated. But, once admit the free coinage of laws by courts and juries for each lawsuit and litigant, and the free coinage of silver will no longer be open to criticism.

## IV.

*No estoppel as to any property owners because benefit is only indirect and common to all.*

But there is another reason why this theory of a lien or obligation by estoppel can not be maintained in this case. This levee was to be about fifty-two miles long. It was supposed that, if constructed and maintained according to the plan, it would protect something like one hundred thousand acres of land from the overflow of the Mississippi. It is conceded by counsel for appellants that, as to a large part of the owners of these lands, no lien can be successfully claimed or enforced, because it is conceded that they have done nothing to create a lien by estoppel. It is, of course, conceded that as to all of the lands, except the strip taken for right of way and immediately covered by the levee, the work was not constructed upon the lands of the defendants. In other words, most of the farms which it is claimed were benefited, or were expected to be benefited by the levee, were more or less remote therefrom. The theory of the complainants is, however, that by reason of the fact that the owners of these lands got some benefit from the levee, and by reason of the further fact that it is claimed that some of them had to do with the passage of the statute, that others, by petition, encouragement or

otherwise, invoked the application of the law, therefore there was created an obligation to pay, and a lien as security for such payment.

A careful examination of the authorities upon this subject shows that this contention is not maintainable. The parties who aided in procuring the adoption of the supposed statute, or who invoked its application, are benefited, if benefited at all, only in common with all the other owners of the one hundred thousand acres of land. No special or peculiar benefit has been conferred upon their lands. The improvement, if it be an improvement, has not been made upon their lands. The benefit is indirect and incidental, and is received in common with all the other owners of the property in the district. In such case it is submitted there not only can be no lien, but there is not even an implied obligation to pay.

Thus, in the case of *Cincinnati S. & C. Railroad* v. *Bensley*, 51 Fed. 738, circuit court of appeals, sixth circuit, the opinion of Mr. Justice Brown seems to us to be very directly in point. In that case, it being proposed to purchase a certain site for a board of trade building in Chicago, subscriptions were sought from the owners of neighboring property, on the theory that the value thereof would be largely increased by the erection of such building. Defendant, among others, signed this subscription, being induced thereto by "the probable increase in value of neighboring estates, and the further consideration that the board of trade shall erect and complete said proposed building and occupy the same for its regular sessions within two years from January 1, 1881." It was held that time was of the essence of the contract, and, the purchase and completion of the building not being within two years, the express promise failed. There-

upon it was contended that the subscribers were liable as upon a quantum meruit. Justice Brown, however, distinctly repudiates this contention; and, while he agrees that the property of the subscriber in the neighborhood was doubtless increased in value, yet it was only so increased in common with that of other holders of property in the immediate neighborhood, who, it was conceded, would not be liable, and therefore the defendant was not liable. It is shown in the opinion, upon a very full discussion, that the principle upon which parties are held liable upon a *quantum meruit*, by reason of improvements made, applies only where the improvements are made on their property, and has no application in other cases.

In the course of the opinion his honor quotes from the opinion of Mr. Justice Brewer of the supreme court of Kansas in *Railway Company* v. *Thompson*, 24 Kan. 170. In that case it was sought to hold the City of Parsons for improvements made by a railroad company in the city, the improvements being made upon the property of the company, and it was held that, the conditions of the express promise not having been complied with, there was no implied promise to pay, and the city was not liable.

The same doctrine is very fully discussed and adhered to in *Traveller's Insurance Co.* v. *The Mayor of Johnson City*, 99 Fed. Rep. 663 (circuit court of appeals, sixth circuit). The syllabus in that case is as follows:

"A purchaser, in the market, of negotiable bonds payable to bearer, and unindorsed, issued by a city to a railroad company of another state, to whom it had no power to issue the bonds, in payment of a subscription to the company's stock, which it had no power to make, although it had power to subscribe for the stock of a domestic corporation, and to issue its bonds in

payment therefor, can not recover from the city the amount paid for such bonds as money had and received to the city's use and benefit on the ground that the stock had been delivered and retained, and the railroad and a depot constructed, which were the conditions upon which the subscription was made. In such case the stock was void in the hands of the city for want of power on its part to become a stockholder; and the railroad and depot, built on lands owned by the company, did not become property of the city, or confer upon it any such direct benefits as could raise an implied promise to pay therefor independently of its void contract."

In the course of the opinion in that case, Judge Taft quotes from the opinion of Mr. Justice Jackson in *Hedges* v. *Dixon Co.*, 150 U. S. 182, 186. In that case the county had issued bonds in aid of a railroad in excess of its authority, and the holders of the bonds filed a bill in which they asked from the court the relief of cutting down the obligation of the bonds proportionately so as to bring it within the lawful amounts. The supreme court held that the relief could not be granted, and referring to the cases of *Louisiana* v. *Wood*, 102 U. S. 294, and *Read* v. *City of Plattsmouth*, 107 U. S. 568, in which it had been permitted to holders of the bonds issued without authority to recover from the municipal corporation issuing the bonds the amount of money received and expended by it for lawful purposes as money had and received for its use, this court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from

the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

Just so in the case at bar. No improvement has been made upon the property of the defendants, who it is claimed are estopped, nor have they received any benefit peculiar to themselves or different from that of their neighbors, owners of other parts of the hundred thousand acres designed to be protected by the levee, and who it is conceded are not liable, and can not be made liable, by estoppel.

The use, so far as the same was used, of the levee partially constructed under the contract, could no more operate as an estoppel upon these property owners, than the action of the city of Galesburg, in taking possession of and using the water mains, could estop the city in the case of the *Farmers' Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156. Indeed the decision in the Galesburg case is in many ways much in point here. It was held there that the contract of the water company was not merely to build a system of water-works which the city authorities would accept once for all, but that their obligation was to construct a system that would be operative to furnish a supply of good water, just as we maintain here that the contractors were bound to make a levee which would protect this property. It was held that the consideration and obligation in the Galesburg case were continuing. And so we maintain here that the consideration on which these property owners went into this scheme at all was that, under the law, the levee could be maintained, as well as originally constructed.

Surely if the attempt had been made to raise funds

for the construction of this levee by contract instead of by a tax, and if the parties had undertaken to pay their several subscriptions in consideration of the construction and maintenance of the levee, and if the parties having the work in charge had undertaken to provide only for construction and not at all for maintenance, no one would contend that the subscriptions could be enforced. And certainly no court could be found to adjudge that the maintenance was not just as important a part of the consideration as the original construction, or that the consideration was separable and not entire, or that the subscription would have been made for the construction independently of the maintenance.

Here, as pointed out in our original brief, not only did the consideration which the property owners expected fail as to obtaining money by assessments to make repairs, but even the original construction entirely failed to meet the requirements of the contract. This is proven by the testimony of a score of witnesses.

## V.

*No estoppel or liability because contract made and bonds issued in violation of statute.*

But there is still another ground upon which this alleged estoppel and liability necessarily fail. It is claimed on behalf of appellants that the parties who were instrumental in procuring the passage of this pretended statute, and those who were instrumental in having it put into operation, are estopped to question its validity or to deny their liability under the same.

Of course, we maintain, as was held by Mr.

Justice Harlan in the circuit court of appeals, and as we think is the universal doctrine, that no man can be held liable for the enactment of a law; that it must and will be conclusively presumed, with reference to any statute, that it is the expression of the intelligence and conscience of the legislators, uninfluenced by any outside considerations.

But waiving that, for the sake of the argument, it can not be successfully claimed that any of these parties who were influential in procuring the enactment of this statute, or who were influential in setting the same in operation, intended or were responsible for anything done not according to the terms of the alleged statute. If a man is to be held responsible for procuring the enactment of a statute, or for putting it in operation, that responsibility must be according to the terms of the statute. But in this case, at the very start, the commissioners directly violated the terms of the statute, and entered into a contract not within the contemplation of the statute, and which was directly in the teeth of their obligations to the property owners.

Section 35 of the statute (brief of Gen. Duffield, page 118) reads as follows:

"The commissioners may borrow money not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

That is, the commissioners had authority to "*borrow money*," and to secure the same by notes or bonds bearing interest at a rate not exceeding ten per cent. per annum. Did they borrow money? Not at all. But they entered into construction contract with Skelsey, Fuller & Pierce, by the terms of which the contractors were to do the work, and were to be paid therefor in these very bonds at *ninety cents* on the dollar, or at a discount of ten per cent.

Transcript, page 374.

Was this the equivalent of borrowing money? Was this obeying the mandate of the statute that required that the bonds should not bear interest at a rate exceeding ten per cent? Were the commissioners, under that statute authorizing them "to borrow money," and to issue the bonds to bear interest not exceeding ten per cent., for an amount not exceeding the then unpaid assessment, at liberty, instead of borrowing money, to make a contract for the work, and barter the bonds at a discount in payment therefor? Upon principle it is submitted any one would answer this question in the negative; and it has been so directly adjudged by the court of appeals of New York in decisions which have the sanction of this court.

*Gould* v. *Town of Sterling*, 23 N. Y. 456, 458;
*Starin* v. *Town of Genoa*, 23 N. Y. 439, 454.

In these cases the statute authorized the officers of the town to borrow money and to pay it over to the president and directors of the railroad company to be expended by them in creating and constructing a railroad, etc. The statute, as in the case at bar, limited the rate of interest but did not say anything about not

putting out the bonds at less than par; it was in these respects just like the statute here under discussion. Instead of borrowing the money, the supervisor and commissioners delivered over the bonds of the company in payment for stock for which they were authorized by the act to subscribe, and the company sold them at a discount. The question was whether this was within the authority conferred by the act, and it was held not to be within such authority, and that the bonds were void.

These decisions were reaffirmed by the court of appeals of New York in the case of *Horton* v. *Town of Thompson*, 71 N. Y. 513, in an opinion of which the following summarizes the results.

*Horton* v. *Town of Thompson*, 71 N. Y. 513.

RAPALLO, J. "The act under which the bonds in question in this action were issued required among other things that before contracting the debt or issuing the bonds the written consent should be obtained of a majority of the tax-payers stating the amount of money authorized to be raised and the railroad company in the stock of which such money should be invested. The commissioners to be appointed under the act were thereby authorized to borrow the money on the credit of the town. They were authorized to dispose of the bonds, but for not less than par, and the money to be thus raised was required to be invested in the stock of such company, meaning evidently the company named in the consent. The act further required that such money be applied to the construction of the railroad and to no other purpose. These provisions were intended to secure the application to the construction of the road, for whose aid the bonds were to be issued, of the full amount of the money for which the tax-payers should consent that the credit of the town be pledged without deduction or discount. * * * The money was to be borrowed and the bonds issued by the commissioners to be ap-

pointed in the manner prescribed by the act. These commissioners were in no sense town officers nor did they represent the town. (*Sheboygan County* v. *Parker*, 3 Wall. 96.) * * *

"The only authority given to the commissioners by this consent was to proceed according to the provisions of the act of 1868, that is, to borrow money by disposing of the bonds at not less than par and to invest the money so raised in the stock of a railroad company. They were not authorized to issue bonds in exchange for the stock of any railroad company. Such a proceeding was wholly unauthorized and was in substance prohibited by the act referred to in the consent, and would defeat one of its most important objects. As said by Grover, J., in the case of *People* v. *Batchelor*, 53 N. Y. 128, under the act of 1867, which contained the same provision as the act now under consideration, care was taken that the bonds should not be issued for less than their par value in cash; thus, there would, in case the town were bonded, be secured for the construction of the road cash equal to the principal of the bonds. If the bonds are delivered to the company on the receipt of the stock pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom for the construction of the road. It is obvious that the consent does not embrace such a transaction. The same point was adjudged in *Starin* v. *Town of Genoa* (23 N. Y. 439) and *Gould* v. *Town of Sterling* (23 N. Y. 459), and it was held in those cases that no recovery could be had upon the bonds thus issued in violation of the provisions of the act authorizing them."

Accordingly the bonds, $148,000, were adjudged void, being issued for stock and not according to the terms of the act; and, although they were negotiable in form, the holders were chargeable with notice. It was also held that by accepting the stock the town

had not ratified the issue or waived any irregularity and was not estopped. It was also declared that the "commissioners are not the town; they are not officers of the town nor representatives appointed by it. They are mere instruments created by the legislature to carry into effect the provisions of the act of 1868, and have no powers other than those contained in that act. * * * The town is not therefore bound by the acts of the commissioners beyond or in contravention of the act of 1868 and the consent given thereunder."

It was further held that these bonds having been thus issued without the consent of the tax-payers, the legislature could not ratify and make them a valid debt, because, though the legislature could *authorize* the town to take stock and create a debt, it could not impose on the town an *obligation* to do so without the consent of the tax-payers. This, it will be noticed, is in accord with what was held by the Illinois court in the Updike case.

In the case of *Rogers* v. *City of Burlington*, 3 Wall. 654, the question was presented to this court whether a city having power "to borrow money for any public purpose" has authority to aid in the construction of a railroad company; and, by the majority of the court as then constituted, the question was decided in the affirmative; and it was adjudged that as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds to be sold by the railroad company to raise money. It was also held in the same case that, power to issue the bonds being shown, the municipal corporation, *as against bona fide holders of them for value*, is estopped to deny that the power was properly executed. Instead of borrowing money directly, the city issued and lent to

the railroad company seventy-five thousand dollars in its bonds payable in twenty years with interest at ten per cent. per annum, the payment to be secured by first mortgage bonds of the company on the second section of the road. The opinion in that case was delivered by Mr. Justice Clifford, Justices Wayne, Swayne, Nelson and Davis, concurring. A dissenting opinion was filed by Mr. Justice Field, in which the Chief Justice and Justices Grier and Miller concurred. As above stated, in the majority opinion, it was held that, as against an innocent purchaser for value, the city could not question the manner in which these bonds, which were negotiable upon their face, were issued. Mr. Justice Field, however, speaking for the minority of the court, emphasized the familiar doctrine that a municipal corporation has only the powers expressly granted or necessarily implied, and that the power must be exercised substantially in the mode designated, and, insisting that the loaning of the bonds by the city to the railroad company was not a "borrowing money" within the terms of the statute, said:

"Here the authority conferred is to *borrow money;* yet no money was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms. The two things which they indicate are essentially distinct and different. * * * The question presented is not a new one. In *Gould* v. *The Town of Sterling*, a statute of New York had authorized the officers of the town to borrow the sum of twenty-five thousand dollars, and pay it over to the president and directors of a railroad company, to be expended by them in grading and constructing a railroad. Instead of borrowing the money, the officers of the town delivered over the bonds of the town to the company in payment for stock, for which they were authorized by the act to subscribe, and the company sold them at a discount. The question was, whether this was

within the authority conferred by the act? Mr. Justice Selden, speaking for the court of appeals of New York, in an opinion of marked ability, answers the question in the negative. 'It is clearly,' says that learned justice, 'not within its language. No money was borrowed, and nothing else was authorized by the terms of the act. If, however, what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that neither in respect to the railroad company nor the town was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their road. As it was, they were compelled to sell the bonds at a discount in order to realize the money. * * * It is true the town did not itself sell the bonds, nor make any sacrifice upon them. It transferred them to the railroad company at par, in payment for stock, for which it was authorized to subscribe. This, however, does not strengthen the plaintiff's case. It was as much a departure from the terms of the statute as if the town had itself sold the bonds at a discount, and was equally inconsistent with the object and intent of the act, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town to expend upon the road, in the completion of which the town was supposed to have an interest. There is, therefore, in this case, not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were, consequently, void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.'

I can add nothing to this language, or to the cogency of the reasoning of the learned judge. Every word is applicable to the case under consideration."

In the case at bar there is no pretense that the bonds are commercial paper, or that Mr. Palms got any better equities than the contractors had.

While in *Rogers* v. *Burlington* the majority of the court did not contravert the doctrine of *Gould* v. *The Town of Sterling*, but only decided that, as against *bona fide* holders, the town could not dispute that the bonds were properly issued, yet even as to what was decided in that case the decision has since been expressly overruled.

*Brenham* v. *The German-American Bank*, 144 U. S. 173, 187;

*Barnum* v. *Okolona*, 148 U. S. 393.

We submit the opinion of the minority in the Roger's case, therefore, stands now as the law in this court.

The supreme court of Indiana has had this precise question under consideration in two or three cases, and emphatically endorsed the decision in the case of *Gould* v. *The Town of Sterling* and *Starin* v. *The Town of Genoa*.

*Rushville Gas Co.* v. *City of Rushville*, 121 Ind. 206, 214.

In the opinion in that case the court says:

"The case of *State, ex rel.*, v. *Hauser*, 63 Ind. 155, does not decide that a city may not issue bonds to pay for water-works purchased; what it decides is, that a city may not issue and sell bonds in order to obtain money to construct water-works. The difference between that case and this is very broad and very plain; here bonds are to be issued to pay for property purchased; there they were issued to be placed on the market for sale. Issuing bonds to pay for property purchased is a very different thing from issuing bonds to obtain money."

So in *City of Richmond* v. *McGirr*, 78 Ind. 192, an attempt was made to maintain that the contracting of a debt by a municipal corporation was the same thing as the borrowing of money, and the court said:

"But it is insisted that the purchase of the lot and the agreement to pay the consideration therefor were the same thing as borrowing money; that it was in substance Price paying his indebtedness to Morrison, and Morrison loaning the money to the city. The city got no money by loan or otherwise, but it got the property and agreed to pay for it. We can not see anything like a loan in the transaction." Citing

*Gelpcke* v. *Dubuque*, 1 Wall. 221;
*Gould* v. *Town of Sterling*, 23 N. Y. 458.

Just so in the case at bar. The commissioners, under section 35 of the act of 1871, had no authority to use the bonds in question except as evidence of money borrowed. They had no authority to trade them for labor and materials, even at par, much less cause an increased rate of interest by bartering them at a discount. The property owners, supposing this law was capable of execution and was to be executed, were interested that every dollar obtainable upon those bonds should be available for the construction of the work. If, as is said in the Gould case, the bonds could be bartered at a discount of ten per cent., they could be bartered at a discount of twenty or thirty, and value received by the property owners would be reduced accordingly. The statute authorized the commissioners to borrow money, and issue bonds as evidence and security for the same; but they were not authorized to issue bonds in excess of the money borrowed, whether at the rate of two for one, four for three, or nine for ten.

This contract, then, being invalid, the bonds, according to the decisions cited, were void; and not being issued or used in conformity with the requirement of the statute, there is not the slightest ground upon which to claim any estoppel against any of the property owners.

Directly in line with these decisions is:

*Travellers' Insurance Co.* v. *Mayor of Johnson City*, 99 Fed. Rep. 663;

*Johnson City* v. *Charleston*, 100 Tenn. 138, 44 S. W. 670;

*Callahan* v. *Town of Alexandria*, 27 So. 540, 52 La. Ann. 1013.

## VI.

### *Laches.*

Upon the question of laches we desire to add a few words. The act of 1871 was declared invalid by the supreme court of Illinois in 1876, the bonds at the same time being adjudged to be void.

*Updike* v. *Wright*, 81 Ill. 49;

*Webster* v. *People*, same term, unreported.

The act and all proceedings thereunder being thus at an end, complainants' testator thenceforward had no express contract. His money had been invested upon what were supposed to be valid obligations payable out of a special fund to be derived from assessments upon property within a specified taxing district. But the obligations were adjudged void. The taxing district was adjudged to have no existence. Thereupon complainants' testator was remitted to whatever rights he might have, if any, by reason of having advanced the money. What were those rights? Upon

the theory most favorable to Mr. Palms, if the moneys had been advanced to a municipal corporation and had gone into its treasury and been applied to the use of such corporation, an assumpsit might be implied to repay the money. That would be the utmost that could be claimed in such case for Mr. Palms, and the right of action to enforce such repayment would have been immediate, either upon the original advancement of the money, or, at any rate, upon the adjudication that the statute and the bonds were void.

*Merrill* v. *Town of Monticello*, 72 Fed. 462 (C. C. A.);
*Bank* v. *Townsend*, 139 U. S. 67;
*Parkersburg* v. *Brown*, 106 U. S. 487;
*Louisiana City* v. *Wood*, 102 U. S. 294.

Is there any room for doubt, in the case at bar, when the supreme court of Illinois adjudged this statute and the bonds issued thereunder to be invalid, that whatever right of action, whether at law or in equity, Mr. Palms had immediately accrued? It was not a question whether his bonds were due. He had no bonds. It was not a question what were the terms of his contract. He had no contract. He had advanced money under circumstances which, assuming all that he contends for, gave him an implied assumpsit or an equity to demand its repayment, and, if not repaid, to enforce such repayment by action, or by suit to enforce a pretended lien upon these lands. If his right to sue (supposing he had such right), did not accrue then, when did it accrue? And if it did accrue at that time, it is submitted that it was completely barred by the statute of limitations of Illinois long before any one of the defendants as land-owners was brought before the court.

Section 15, act of April, 1872 (Starr & Curtis' Annotated Statutes, volume 2, page 2624), reads as follows:

"SEC. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for injury done to property, real or personal, or to recover damages for the detention or conversion thereof, *and all civil actions not otherwise provided for*, shall be commenced within five years next after the cause of action accrued."

That this proceeding is bottomed on an implied obligation by these property owners to pay their respective shares of this money by reason of the supposed benefit received, is entirely clear. At any rate it is an attempt by a proceeding in court to enforce such payment. If it were an action at law, there would be no question that it was squarely within the terms of the above section of the statute. It is none the less so because it is a proceeding in equity to reach the same end.

Thus in *Junker* v. *Rush*, 136 Ill. 179, it is adjudged that where a surety has paid the obligation of his principal and seeks indemnity, although he seeks it by means of a bill in equity with a view of being subrogated to the rights of the creditor against the principal in the judgment, yet, such proceeding is barred by the five years' limitations.

So it is adjudged, in Illinois, that money advanced upon a forged note and mortgage can only be recovered back by a suit within five years from the time the same is advanced.

*Lunt* v. *Wrenn*, 113 Ill. 168–177.
*Wilson* v. *Williams*, 42 Ill. App. 612.

And it has been expressly adjudged, and is the set-

tled law of Illinois, that courts of equity do not merely follow the analogy of the statute of limitations, but that they are bound thereby the same as the courts of law.

*Bonney* v. *Stoughton*, 122 Ill. 536;
Story's Equity Jurisprudence, section 529.

Such being the law of Illinois, it is also the law for the federal courts.

*Amy* v. *Dubuque*, 98 U. S. 470;
*Ewell* v. *Daggs*, 108 U. S. 143.

The lien is a mere incident to the debt or charge.

*Carpenter* v. *Longan*, 16 Wall. 271;
*Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 268–283.

And a tax is a debt in such a sense as to be barred by statute of limitations.

*Bristol* v. *Washington Co.*, 177 U. S. 133.

Upon principle, as well as under the above authorities, it may well be insisted, if it were necessary to make such claim, that the right of action of Mr. Palms accrued immediately upon the payment of his money, assuming that he has a right of action at all. When he bought the bonds, the statute of 1871 was void. The subsequent decision of the supreme court of Illinois did not create a new condition. It simply adjudged and declared a condition already existing, namely, that that statute was unconstitutional and void. The payment of the money, therefore, was a payment altogether outside of any legal warrant. This court has held that where a bank pays money upon a forged check, with a forged endorsement, both parties supposing the signatures

to be genuine, the right of action to recover back the money accrues at the date of the payment and the statute of limitations begins to run from that date.

*Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26.

But whether the cause of action accrued when the money was paid over in 1872, or when the law was adjudged void in 1876, or when the final leave was granted to bring in the land-owners as parties in 1881, any proceeding in the courts for the collection of the same was barred long before either one of the defendants as land-owners was brought into court. The suit against the commissioners did not seek to enforce any claim against them or their lands as such. That suit, commenced in 1878, was against them in their supposed official capacity, and sought only relief against them as commissioners. And thereafter eleven years elapsed before a single one of the land-owners was made a party defendant or brought into court.

And it is to be borne in mind that there is nothing in the suggestion that the complainants did not obtain a final and definite leave to bring in the property owners until 1881. They did not need leave to bring in the property owners. They had a perfect right to bring their bill in equity against the property owners at any time, without leave of any court, except as they may have voluntarily deprived themselves of that right.

We have then this situation. Mr. Palms purchased non-commercial bonds upon the supposition that they were valid bonds. It turned out that there was no law for the issue of such bonds. No such corporation or body or commissioners as purported to issue them existed, and his bonds were void. He is now

trying to collect the money so advanced from the owners of property which he claims was benefited thereby. But before bringing a single one of these bondholders into court, there elapsed from the time he advanced the money in 1872, seventeen years; from the time he commenced his suit against the commissioners, May 4, 1878, eleven years; from the time he took his first leave to make property owners parties, March 13, 1879, ten years; from the time, July 7, 1880, he took the final leave of court to bring in the property owners as parties, nine years. In the meantime the property was changing hands, owners were dying, heirs were succeeding to inheritances, the levee repeatedly broke, the property was all inundated and all improvements swept away several times, with a loss to the property owners of several millions of dollars. Some hundreds of thousands of dollars, raised by voluntary contributions, by government appropriation, and by assessment on the property under a new law, were expended in trying to reconstruct the levee before it would at all answer its original purpose. In the meantime, Mr. Palms and his executors were waiting and watching from the hill tops to see whether anything would be created in this marshy valley that would warrant an attempt to enforce his claim. It seems to us that to say that the complainants are not barred by laches in such a case, is to say that neither limitations nor laches as a defense will be recognized in a court of equity.

Respectfully submitted,

W. H. H. MILLER,

*Of Counsel for Certain Appellees.*

A. C. MATHEWS,

THOMAS WORTHINGTON,

HARRY HIGBEE,

*Counsel.*